

**REIMBURSEMENT AGREEMENT WITH MREC-DAVIDSON FAIRBANKS, LLC FOR
A PORTION OF PROJECT NO. T-4.3 (CARMEL VALLEY ROAD (WIDEN TO FOUR
LANES: VIA ALBERTURA TO CAMINO DEL SUR)), AND A PORTION OF PROJECT
NO. P-6 (TORREY HIGHLANDS TRAIL SYSTEM) IN
THE TORREY HIGHLANDS COMMUNITY**

THIS AGREEMENT [Agreement] is made and entered into between THE CITY OF SAN DIEGO, a municipal corporation [City] and MREC -Davidson Fairbanks, LLC, a California limited liability company [Subdivider] [collectively, the Parties], for reimbursement for design and construction of a portion of Project No. T-4.3 (Carmel Valley Road (Widen to Four Lanes: Via Albertura to Camino del Sur)) and a portion of Project No. P-6 (Torrey Highlands Trail System) in the Torrey Highlands Community Plan area in accordance with the Torrey Highlands Public Facilities Financing Plan.

RECITALS

1. On September 24, 2002, the City of San Diego City Council [City Council] adopted Resolution No. R-297090 granting Vesting Tentative Map No. 99-0329 [VTM] to Subdivider subject to certain conditions necessary to serve that development. The coversheet and page 14 of the VTM are provided in **Exhibit A**.
2. Subdivider plans to design and construct, and seeks reimbursement for, a portion of Project No. T-4.3 [Road Project] and a portion of Project No. P-6 [Park Project]. This Agreement relates solely to the scope of work provided in **Exhibit B** for the Road Project and Park Project. The scope of work for the Road Project is depicted in **Exhibit C-1** and the scope of work for the Park Project is depicted in **Exhibit C-2**. The Road Project and the Park Project are collectively referred to throughout this Agreement as the Projects.
3. On May 26, 2009, City Council adopted Resolution No. R-304935 approving the Torrey Highlands Public Facilities Financing Plan, and Facilities Benefit Assessment [FBA] as defined in San Diego Municipal Code section 61.2202(i) for Fiscal Year 2010 [Financing Plan]. The Financing Plan identifies and includes Project No. T-4.3 as shown in **Exhibit D-1**. An amendment to the Financing Plan, on file in the Office of the City Clerk as Document No. RR-**307252** [Financing Plan Amendment], is being considered along with this Agreement. The Financing Plan Amendment amends the project sheet for Project No. T-4.3 to add a waterline to the description of Project No. T-4.3, as shown in **Exhibit D-2**. The Financing Plan also identifies and includes Project No. P-6 as shown in **Exhibit D-3**.
4. The Financing Plan estimate of \$7,706,783, minus the City's Administrative Costs as defined in section 13.1.5 and City's equipment expenditures, constitutes the total and maximum City funds potentially available for reimbursement for the remaining portions of Project No. T-4.3. Of the amount available for the entire remaining portion of Project T-4.3, \$2,656,630 is currently available for reimbursement to Subdivider for the Road Project that is the subject of this Agreement [Road Project Maximum Funds]. The Financing Plan estimate of \$469,278, minus the City's Administrative Costs as defined in Section 13.1.5 and City's equipment expenditures, constitutes the total and maximum City funds potentially available for reimbursement for the remaining portions of Project No. P-6. Of the amount available for the

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entire remaining portions of Project P-6, \$281,016 is currently available for reimbursement to Subdivider for the Park Project that is the subject of this Agreement [Park Project Maximum Funds]. The Road Project Maximum Funds and the Park Project Maximum Funds are collectively referred to throughout this Agreement as Maximum Funds. However, the Road Project Maximum Funds may not be used for costs associated with the Park Project, and the Park Project Maximum Funds may not be used for costs associated with the Road Project. The Maximum Funds constitute absolute caps for the Projects. Subdivider is not automatically entitled to the Maximum Funds. Subdivider must satisfy all terms of this Agreement to become eligible for reimbursement for any portion of the Maximum Funds if and as they are collected and become available for reimbursement.

5. The Subdivider's Estimated Cost (as defined in Section 3.3) of the Road Project is \$2,656,630 and Subdivider's Estimated Cost of the Park Project is \$281,016. The Estimated Cost for the Road Project is the total and maximum amount available for reimbursement by City to Subdivider for the Road Project, and the Estimated Cost for the Park Project is the total and maximum amount available for reimbursement by City to Subdivider for the Park Project, unless otherwise approved by City in accordance with the change order procedures set forth in Article III of this Agreement. The Estimated Cost of the Park Project and the Estimated Cost of the Road Project are collectively referred to throughout this Agreement as the Estimated Costs.

6. This Agreement is intended by the Parties to define the method, terms, and conditions of reimbursement to Subdivider, for the funds to be expended for the planning, permitting, and construction of the Projects.

NOW, THEREFORE, in consideration of the recitals and mutual obligations of the Parties, and for other good and valuable consideration, City and Subdivider agree as follows:

ARTICLE I. SUBJECT OF THE AGREEMENT

- 1.1 **Subdivider Design and Construction of Project.** Subdivider shall design and construct the Projects to be complete and operational for the purpose for which it was intended in accordance with: this Agreement; the Plans and Specifications; the Financing Plan; and within the timeframe established by the Project Schedule attached as **Exhibit E**, and for the Estimated Costs attached as **Exhibit F-1** (Road Project) and **Exhibit F-2** (Park Project).
- 1.2 **Operational Acceptance.** For purposes of this Agreement, "Operational Acceptance" shall occur upon Subdivider's receipt of a letter of acceptance from City after Subdivider complies with the Punch List and passes Final Inspection of Project (as defined in Section 16.3), confirming that the Project is substantially complete and ready for operational use as determined by City [Operational Acceptance].
- 1.3 **Reimbursement.** Subdivider shall be eligible for reimbursement for its costs associated with the Projects in accordance with this Agreement.

ARTICLE II. PROJECT SCHEDULE

- 2.1 **Project Schedule.** Subdivider shall perform and complete the work under this Agreement according to the Project Schedule, including its obligations and components approved by the City in **Exhibit G**. The Project Schedule includes the meeting requirements in **Exhibit H**; and preconstruction, progress, and special meeting agendas in **Exhibit I**.
- 2.2 **Project Completion.** Subdivider agrees all work on the Projects under this Agreement will be complete and ready for operational use according to the Project Schedule in **Exhibit E**, and the Project Schedule obligations and components in **Exhibit G**.
- 2.3 **Changes in Project Schedule.**
- 2.3.1 Changes in the Project Schedule that increase the Estimated Costs must be approved by City in writing as set forth in **Exhibit J**.
- 2.3.2 Changes in the Project Schedule that do not increase the Estimated Costs may be approved by the engineer designated by City's Department of Engineering and Capital Projects with responsibility for review and approval of the progress of and changes to Project [Resident Engineer], provided that the Projects will still be completed in accordance with the Financing Plan (including any associated Phasing Plans).
- 2.4 **Notification of Delay.** If Subdivider anticipates or has reason to believe performance of work under this Agreement will be delayed, Subdivider shall immediately notify the representative designated by City to manage the Project on behalf of City [Project Manager] in writing. Unless City grants Subdivider additional time to ascertain supporting data, a written notice of the delay must be delivered to City within thirty (30) calendar days of the initial notification and shall include: an explanation of the cause of the delay, a reasonable estimate of the length of the delay, any anticipated increased costs due to delay, all supporting data, and written statement that the time adjustment requested is the entire time adjustment Subdivider needs as a result of the cause of the delay. If Subdivider anticipates or has reason to believe the delay will increase the Estimated Costs, Subdivider shall also give notice to City in accordance with Section 3.4.
- 2.5 **Delay.** If delay in the performance of work required under this Agreement is caused by unforeseen events beyond the control of one or both of the Parties, such delay may entitle Subdivider to a reasonable extension of time. Any such extension of time must be approved in writing by City, and will not be unreasonably withheld. The following is a non-exclusive list of conditions that may justify such a delay depending on their actual impact on Projects: war; changes in law or government regulation; later commonly accepted or adopted higher standards and specifications of construction; labor disputes or strikes; fires; floods; adverse weather or other similar condition of the elements necessitating temporary cessation of Subdivider's work; concealed conditions encountered in the completion of the Projects; inability to reasonably obtain materials, equipment, labor, or additional required services; or other specific reasons mutually

agreed to in writing by City and Subdivider. Any delay claimed to be caused by Subdivider's inability to obtain materials, equipment, labor, or additional required services shall not entitle Subdivider to an extension of time unless Subdivider furnishes to City, in accordance with the notification requirements in Section 2.4, documentary proof satisfactory to City of Subdivider's inability to reasonably obtain material, equipment, labor, or additional required services. Under circumstances other than the above or otherwise provided for in this Agreement, Subdivider shall not be entitled to any extension of time, additional costs, or expenses for any delay caused by the acts or omissions of Subdivider, its consultants, contractors, subcontractors, employees, or other agents [collectively, "Subdivider's agents"]. A change in Project Schedule does not automatically entitle Subdivider to an increase in Reimbursable Costs (as defined in Section 3.2). If City determines that the delay will materially affect the Projects, City may exercise its rights under Section 2.7 of this Agreement.

- 2.6 **Costs of Delay.** City and Subdivider acknowledge construction delays may increase the cost of the Projects. Unless Subdivider informs City pursuant to Sections 2.4 and 3.4 of cost increases due to delay and such cost increases are determined by City to be reasonable and are fully recovered through assessed fees in the Financing Plan, funding will be insufficient to cover the cost increase. Notwithstanding that pursuant to San Diego Municipal Code section 61.2200 et seq. City may periodically update the Financing Plan to reflect changes in Estimated Costs of the Projects (including potentially increasing Estimated Costs of the Projects based upon actual and reasonable costs as appropriate), Subdivider agrees to absorb any increase in Estimated Costs and/or Interest thereon not accounted for in the Financing Plan (or future updates of the Financing Plan) allowing City reasonable opportunity to assess and collect necessary FBAs that arise because Subdivider failed to timely notify the City in writing as required under Sections 2.4 and 3.4.

2.7 **City's Right to Terminate for Default.**

- 2.7.1 If Subdivider fails to adequately perform its obligation required by this Agreement, Subdivider's failure constitutes a Default. Unless within thirty (30) calendar days of receiving written notice from City specifying the nature of the Default Subdivider undertakes all reasonable efforts to ensure the Default is remedied within a reasonable time period to the satisfaction of City, City may immediately terminate this Agreement including all rights of Subdivider and any person or entity claiming any rights by or through Subdivider under this Agreement by giving written notice to Subdivider. A delay for which an extension of time is not granted by the City shall not constitute a Default if Subdivider has made good faith and reasonable efforts to adhere to the Project Schedule, has provided notice of delay in accordance with Section 2.4, and such delay was caused by unforeseen events that justify the delay as set forth in Section 2.5.
- 2.7.2 If City terminates the Agreement due to Subdivider's Default, City shall have the option to assume all of the rights of any and all contracts or subcontracts entered into by Subdivider or its agents for the construction of the Project. Subdivider

shall include, and require its contractors and subcontractors include provisions in their contracts and subcontracts, that City is a third party beneficiary of the same and that City is entitled to and protected by the indemnities and warranties, whether written or express, contained therein.

- 2.7.3 The rights and remedies of City enumerated in Section 2.7 are cumulative and shall not limit, waive, or deny City's rights under other provisions of this Agreement, or waive or deny any right or remedy at law or in equity available to City against Subdivider, including any claims for damages against Subdivider that City may assert as a result of the Default.

- 2.8 **City's Right to Terminate for Bankruptcy or Assignment for the Benefit of Creditors.** If Subdivider files a voluntary petition in bankruptcy, is adjudicated bankrupt, or makes a general assignment for the benefit of creditors, City may at its option and without further notice to or demand upon Subdivider immediately terminate this Agreement, and terminate all rights of Subdivider and any person or entity claiming any rights by or through Subdivider. The rights and remedies of City enumerated in this Section are cumulative and shall not limit, waive, or deny any of City's rights or remedies under other provisions of this Agreement or those available at law or in equity.

ARTICLE III. PROJECT COSTS AND CHANGE ORDERS

- 3.1 **Project Costs.** Project Costs are Subdivider's reasonable costs of materials, construction, and design necessary for the Projects, as approved by the City and as shown on **Exhibit F-1** and **Exhibit F-2**. Project Costs do not include Subdivider's Administrative costs (as defined in Section 3.3.1).
- 3.2 **Reimbursable Costs.** Subdivider may seek reimbursement only for Reimbursable Costs. Reimbursable Costs shall consist only of the Estimated Costs (as defined in Section 3.3) expended by Subdivider and approved for reimbursement by City in accordance with the terms of this Agreement.
- 3.2.1 **Non-Reimbursable Costs.** Non-Reimbursable Costs include: (1) Any cost in excess of the Maximum Funds; (2) any cost in excess of the Estimated Costs not approved in accordance with Section 3.3.3; (3) any cost identified in this Agreement as a Non-Reimbursable Cost; (4) any cost to remedy Defective Work (as defined in Section 23.1); (5) any cost incurred as a result of Subdivider's or their agents' negligence, omissions, unapproved delay, or Default; (6) any cost of substituted products, work, or services not necessary for completion of the Project, unless requested and approved by City in writing; (7) any cost not approved by City in the manner required by this Agreement or the Charter of the City of San Diego and rules, regulations, or laws promulgated thereunder; (8) any cost not supported by proper invoicing or other documentation as reasonable and necessary despite City's written request for the same pursuant to Section 13.1.7; and (9) any cost in excess of FBA's actually collected by the City and available for reimbursement to Subdivider for the design and construction of this Project. Additionally, the fair value as reasonably determined by City of any property that

is destroyed, lost, stolen, or damaged rendering it undeliverable, unusable, or inoperable for City constitutes a Non-Reimbursable Cost. Refundable deposits, such as utility deposits, also constitute a Non-Reimbursable Cost.

- 3.3 **Estimated Cost(s)**. Subdivider's Estimated Costs shall consist only of: (i) Project Costs, (ii) Subdivider's Administrative Costs (as defined in Section 3.3.1), and (iii) the Project Contingency (as defined in Section 3.3.2). The total Estimated Cost of the Road Project is \$2,656,630 and the total Estimated Cost for the Park Project is \$281,016, as shown in **Exhibit F-1** and **Exhibit F-2**. Any increase to the Estimated Costs may only be approved in accordance with Section 3.3.3. Although identified on **Exhibits F-1** and **F-2**, Estimated Costs do not include City's Administrative Costs as defined in Section 13.1.5.

3.3.1 ***Subdivider's Administrative Costs***. Subdivider's Administrative Costs are reasonably incurred Projects-related administration and supervision expenditures totaling five percent (5%) of Subdivider's direct Project Costs.

3.3.2 ***Project Contingency***. The Estimated Costs includes a project contingency of ten percent (10%) of estimated construction costs. The project contingency is not available for: (i) work required due to Subdivider's or Subdivider's agents' failure to perform work or services according to the terms of this Agreement or in compliance with the Construction Documents; or (ii) uninsured losses resulting from the negligence of Subdivider or Subdivider's agents.

3.3.3 ***Change Orders and Adjustments to Estimated Costs***. The "Procedure for Processing Change Orders" is attached as **Exhibit J**. Estimated Costs may be increased only through properly processed and approved Change Orders in accordance with **Exhibit J**. Subdivider shall not have the right to terminate, reform, or abandon this Agreement for City's refusal to approve a Change Order.

- 3.4 **Notification of Increased Estimated Costs**. If Subdivider anticipates or has reason to believe the cost of the Projects will exceed the Estimated Costs, Subdivider shall within fourteen (14) calendar days of becoming aware of the potential increase notify City in writing. Subdivider agrees to absorb any increase in Estimated Costs and/or Interest thereon not accounted for in the Financing Plan (or future updates of the Financing Plan) allowing City reasonable opportunity to assess and collect necessary FBAs that arise because Subdivider failed to timely notify the City in writing as required above. This written notification shall include an itemized cost estimate and a list of recommended revisions Subdivider believes will bring the construction cost to an amount within the Estimated Costs. In accordance with Section 3.3.3, City may approve an increase in Estimated Costs and/or delineate a project which may be constructed within the Estimated Costs. If City chooses not to pursue the above options, Subdivider may elect to construct the Projects and forgo any reimbursement in excess of Estimated Costs.

ARTICLE IV. [INTENTIONALLY OMITTED]

ARTICLE V. COMPETITIVE BIDDING, EQUAL OPPORTUNITY, AND EQUAL BENEFITS

- 5.1 **Compliance.** Subdivider shall bid and award construction contracts to complete the Projects in accordance with the Charter of the City of San Diego, San Diego Municipal Code, current City Council Resolutions and Policies, and administrative regulations as well as any expressly applicable public contract laws, rules, and regulations [Required Contracting Procedures]. Required Contracting Procedures include all contracting requirements that are applicable to the City, including, but not limited to, competitive bidding and the City's small and local business program for public works contracts. Prior to bidding the Project, Subdivider shall consult with City's Purchasing and Contracting Department to ensure that all Required Contracting Procedures are met. Subdivider understands that it must comply with all Required Contracting Procedures. Failure to adhere to all Required Contracting Procedures is a material breach of this Agreement, and any contract awarded not in accordance with the Required Contracting Procedures shall be ineligible for reimbursement.
- 5.2 **Bidding Documents.** Subdivider, following City review of the Construction Documents, shall prepare final corrected Construction Documents to be submitted to City for review and approval, in accordance with City's standard review procedures prior to solicitation of bids.
- 5.2.1 ***Submission of Construction Documents.*** Subdivider shall submit bidding documents to City for approval before soliciting bids for work on Projects. City retains the right to notify Subdivider of necessary corrections and will notify Subdivider of required corrections within fifteen (15) Working Days of the Subdivider's submittal date.
- 5.2.2 ***Obtain all Permits and Approvals.*** Subdivider shall obtain all necessary permits, including but not limited to environmental, grading, building, mechanical, electrical, and plumbing. Approval of Construction Documents will be evidenced by City's issuance of a letter indicating Subdivider may proceed with competitive bidding.
- 5.3 **Solicitation of Bids.** Subdivider shall solicit sealed bids for the construction of the Project in accordance with all Required Contracting Procedures. With notice of at least five (5) Working Days, Subdivider shall notify City of the time and place of each bid opening. Subdivider shall work with City's Purchasing and Contracting Department to ensure that bids are solicited in the manner required in accordance with the Required Contracting Procedures.
- 5.4 **Bid Opening and Award of Contract.** Subdivider shall open bids and award contracts in accordance with all the Required Contracting Procedures. Subdivider shall work with City's Purchasing and Contracting Department to ensure that bids are opened and contracts are awarded in the manner required in accordance with the Required

Contracting Procedures. Subdivider shall publicly open sealed bids in the presence of City's authorized representative(s). The bidding contractors shall be permitted to attend the bid opening. City's representative(s) shall be provided with copies of all bids received immediately after the bid opening and with a copy of the tabulation of bid results upon completion by Subdivider. Contract(s) for the construction of the Projects shall be awarded by Subdivider to the lowest responsible and reliable bidder in accordance with Required Contracting Procedures.

5.4.1 In the event that the lowest responsible and reliable bid exceeds the Estimated Costs, Subdivider may request reimbursement for said increase subject to approval of a Change Order pursuant to Section 3.3.3, or Subdivider may choose to award the bid and assume responsibility for costs in excess of the Estimated Costs or Subdivider may rebid the Projects.

5.4.1.1 In the event City Council does not approve the increased cost requested by Subdivider in accordance with the Change Order procedures set forth in Section 3.3.3, and Subdivider does not assume responsibility for the costs in excess of the Estimated Costs, at the City's option:

5.4.1.1.1 City may terminate this Agreement. In the event the Agreement is terminated with respect to the Road Project, the Park Project, or both, Subdivider's obligations pursuant to this Agreement for the construction of the applicable Project shall be released without further liability. This release shall in no way affect the obligations of Subdivider with respect to any terms or conditions of the VTMs, Tentative Map(s), Development Agreements, or other approvals and agreements with City. However, prior to termination of this Agreement, City shall reimburse Subdivider (at City's option and with Subdivider's approval with either FBA credits or cash reimbursement) for the engineering and design costs reasonably incurred and expended by Subdivider in accordance with this Agreement and within the Estimated Costs in accordance with Section 3.3. Subdivider shall provide City with copies of all executed contracts; or

5.4.1.1.2 City may work with Subdivider to rebid and/or redesign the Projects; or

5.4.1.1.3 With Subdivider's consent, Subdivider may award the bid and assume responsibility for the additional costs in excess of the Estimated Costs.

5.5 **Nondiscrimination Requirements.**

5.5.1 ***Compliance with the City's Equal Opportunity Contracting Program.***
Subdivider shall comply with the City's Equal Opportunity Contracting Program. Subdivider shall not discriminate against any employee or applicant for

employment on any basis prohibited by law. Subdivider shall provide equal opportunity in all employment practices. Subdivider shall ensure through contractual obligations that its consultants, contractors and their subcontractors comply with the City's Equal Opportunity Contracting Program. Nothing in this Section shall be interpreted to hold the Subdivider liable for any discriminatory practice of its consultants, contractors or their subcontractors.

5.5.2 Nondiscrimination Ordinance. Subdivider shall not discriminate on the basis of race, gender, religion, national origin, ethnicity, sexual orientation, age, or disability in the solicitation, selection, hiring or treatment of consultants, contractors, subcontractors, vendors or suppliers. Subdivider shall provide equal opportunity for contractors and subcontractors to participate in contracting and subcontracting opportunities. Subdivider understands and agrees that violation of this clause shall be considered a material breach of the Agreement and may result in Agreement termination, debarment, and other sanctions. This language shall be in contracts between the Subdivider and any consultants, contractors, subcontractors, vendors and suppliers.

5.5.3 Compliance Investigations. Upon City's request, Subdivider agrees to provide to City, within sixty (60) calendar days, a truthful and complete list of the names of all consultants, contractors, subcontractors, vendors and suppliers Subdivider used in the past five years on any of its contracts undertaken within San Diego County, including the total dollar amount paid by Subdivider for each contract, subcontract or supply contract. The Subdivider further agrees to fully cooperate in any investigation conducted by City pursuant to City's Nondiscrimination in Contracting Ordinance [San Diego Municipal Code sections 22.3501-22.3517.] Subdivider understands and agrees that violation of this clause shall be considered a material breach of the Agreement and may result in remedies being ordered against Subdivider up to and including Agreement termination, debarment, and other sanctions for violation of the provisions of the Nondiscrimination in Contracting Ordinance. Subdivider further understands and agrees the procedures, remedies and sanctions provided for in the Nondiscrimination Ordinance apply only to violations of said Nondiscrimination Ordinance.

5.6 Equal Benefits. This Agreement is with a sole source and therefore, Subdivider is not subject to the City's Equal Benefits Ordinance, Chapter 2, Article 2, Division 43 of the San Diego Municipal Code [SDMC]. However, the Equal Benefits Ordinance is applicable to contracts that Subdivider enters into with respect to the Project. Therefore, Subdivider shall ensure that its contractor(s) and consultant(s) comply with the Equal Benefits Ordinance by including in each of its contracts with its contractor(s) and consultant(s) provisions (1) stating that the contractor(s) and/or consultant(s) must comply with the Equal Benefits Ordinance; (2) stating that failure to maintain equal benefits is a material breach of those agreements; and (3) requiring the contractor(s) and/or consultant(s) to certify that they will maintain equal benefits for the duration of the contract. SDMC § 22.4304(e)-(f). In addition, Subdivider understands that its contractor(s) and/or consultant(s) must comply with the requirement that they not discriminate in the provision of benefits between employees with spouses and employees

with domestic partners, and that it notify employees of the equal benefits policy at the time of hire and during open enrollment periods during the performance of the contract. SDMC § 22.4304(a)-(b). Subdivider also understands that its contractor(s) and/or consultant(s) must also provide the City with access to documents and records sufficient for the City to verify compliance with the EBO's requirements. SDMC § 22.4304(c). Additionally, Subdivider understands that its contractor(s) and/or consultant(s) may not use a separate entity to evade the requirements of the EBO. SDMC § 22.4304(d). Subdivider shall ensure that its contractor(s) and consultant(s) complete the Equal Benefits Ordinance Certification of Compliance included herein as **Exhibit K**. Subdivider shall also notify the City within five (5) business days of any violations of the Equal Benefits Ordinance by its contractor(s) and/or consultant(s) if it knows or should reasonably know of such violations.

ARTICLE VI. PREVAILING WAGE

- 6.1 **Prevailing Wage.** The Projects shall pay Prevailing Wage to the extent required by the California Labor Code, Charter of the City of San Diego, San Diego Municipal Code, City of San Diego Resolutions and Ordinances, City of San Diego Council Policies and other applicable laws, or if otherwise required by the City Council.

ARTICLE VII. CONSULTANTS

- 7.1 **Selection of Consultant.** Subdivider's hiring of a consultant is subject to approval by City. Subdivider's consultants shall be subject to all State and City laws, including regulations and policies applicable to consultants retained directly by City. Subdivider shall cause the provisions in **Exhibit L** "Consultant Provisions" to be included in its consultant contract(s) for the Project. The selection of any consultant is subject to all applicable consultant selection laws, rules, and regulations, including, but not limited to, the City Charter, City Council Policies, the San Diego Municipal Code, and the City's Administrative Guidelines. Subdivider shall work with City's Purchasing and Contracting Department to ensure that City's consultant selection procedures are followed. Subdivider understands that it must comply with all consultant selection procedures applicable to the City. Failure to adhere to all applicable consultant selection procedures is a material breach of this Agreement, and any contract awarded not in accordance with the City's consultant selection procedures shall be ineligible for reimbursement. Notwithstanding the foregoing, Subdivider is not required to comply with the applicable consultant selection laws, rules, and regulations identified above with respect to those consultants with whom Subdivider, or its predecessor in interest with respect to the real property addressed in the VTM, entered into a contract for the Projects at least one year prior to the Effective Date of this Agreement, but Subdivider is required to use its best efforts to cause the provisions of **Exhibit L** "Consultant Provisions" to be included in these consultant contract(s).
- 7.2 **Equal Benefits.** The requirements of City's Equal Benefits Ordinance apply to each of Subdivider's consultant contracts entered into after the effective date of the City's Equal Benefits Ordinance. See Section 5.6.

- 7.3 **Estimated Budget.** Subdivider shall require its consultant to prepare an estimated budget for Project.
- 7.4 **Schematic Drawings.** Subdivider shall require its consultant to prepare schematic drawings for Project for City approval.

ARTICLE VIII. DESIGN AND CONSTRUCTION STANDARDS

- 8.1 **Standard of Care.** Subdivider agrees that the professional services provided under this Agreement shall be performed in accordance with the standards customarily adhered to by experienced and competent professional architectural, engineering, landscape architecture, and construction firms using the degree of care and skill ordinarily exercised by reputable professionals practicing in the same field of service in the State of California.
- 8.2 **Compliance with all Laws, Design Standards, and Construction Standards.** In all aspects of the design and construction of the Project, Subdivider shall comply with all laws and the most current editions of the Greenbook, the City's Standard Drawings and Design and Construction Standards, including those listed in **Exhibit M**. It is the sole responsibility of Subdivider to comply with The Americans with Disabilities Act and Title 24 of the California Building Standards Code, California Code of Regulations. Subdivider shall certify compliance with Title 24/ADA to City in the form and content as set forth on **Exhibit N** "Certificate for Title 24/ADA Compliance."
- 8.3 **Imputed Knowledge.** Subdivider shall be responsible for all amendments or updates to Design and Construction standards and knowledge of all amendments or updates to Design and Construction Standards, whether local, state, or federal, and such knowledge will be imputed to Subdivider to the fullest extent allowed by law.
- 8.4 **City Approval.** Subdivider's predecessor obtained City approval of design, plans, and specifications in the manner required in **Exhibit O** when the City approved the plans for the Road Project as Drawing No. 32592-D, and the Park Project as Drawing No. 32565-D. Subdivider shall obtain permits in accordance with **Exhibit O**. Unless specifically provided otherwise, whenever this Agreement requires an action or approval by City, that action or approval shall be performed by the duly authorized City representative designated by this Agreement.
- 8.5 **City Approval Not a Waiver of Obligations.** Where approval by City, the Mayor, or other representatives of City is required, it is understood to be general approval only and does not relieve Subdivider of responsibility for complying with all applicable laws, codes, regulations and good consulting, design, or construction practices.

ARTICLE IX. CONSTRUCTION

- 9.1 **Compliance with Project Schedule and Construction Requirements.** Subdivider shall commence construction of the Project in accordance with the Project Schedule, as described in Article II, and be subject to the obligations in **Exhibit P** "Construction Obligations." Subdivider shall diligently pursue such construction to completion. Failure

to maintain the Project Schedule shall constitute a Default subject to Section 2.7. The rights and remedies of City enumerated in this Section are cumulative and shall not limit, waive, or deny any of City's rights or remedies under any other provision of this Agreement of those available at law or in equity.

ARTICLE X. PRODUCTS

- 10.1 **Product Submittal and Substitution.** To the extent product specification is not addressed by the most recent edition of the Standard Specifications for Public Works Construction (including the City of San Diego's standard special provisions) [Green Book] or the Projects have aesthetic aspects requiring City review, comment, and approval, prior to the bidding process, Subdivider shall obtain City approval of products and substitution of products in the manner provided in **Exhibit Q** "Product Submittal and Substitution."

- 10.1.1 ***Not a Release of Liability.*** City's review of samples in no way relieves Subdivider of Subdivider's responsibility for construction of the Projects in full compliance with all Construction Documents.

ARTICLE XI. EXTRA WORK

- 11.1 **City Authority to Order Extra Work.** Any City additions or modifications to work or Subdivider obligations under this Agreement not described within City-approved Construction Documents [Extra Work] may be ordered by City prior to completion pursuant to the terms and conditions listed in **Exhibit R** "Extra Work Provisions."

ARTICLE XII. CHANGED CONDITIONS

- 12.1 **Changed Conditions.** Changed Conditions shall have the meaning as defined in the Green Book. The Parties acknowledge and agree that even if Changed Conditions are found to be present, the Projects shall not exceed the Estimated Costs without express City Council approval of an increase to the Estimated Costs in accordance with Section 3.3.3. Absent such express approval of additional funds, Subdivider shall provide City with value engineering and Parties will return the Project to within the Estimated Costs.

ARTICLE XIII. REIMBURSEMENT

- 13.1 **Reimbursement to Subdivider.**

- 13.1.1 ***Notification of Reimbursable Project.*** Along with the Project applications to City's Development Services Department, and prior to commencement of any construction work on the Projects, Subdivider shall submit a "Notification of Reimbursable Project" form (attached as **Exhibit S**) to City's Development Services Department, Facilities Financing Department, Purchasing & Contracting Department, and the Engineering & Capital Projects Department [Responsible Department]. Though the reimbursement of the Projects is covered under this

Agreement jointly, the Road Project and the Park Project shall be accounted for as if each were an individual project subject to a separate agreement.

- 13.1.2 **Type of Reimbursement.** Subdivider shall be entitled to cash reimbursement, or FBA credits, for the Reimbursable Costs expended by Subdivider and approved by City in accordance with this Agreement and the Financing Plan. The Financing Plan currently has the Estimated Costs for the Projects scheduled for reimbursement beginning in or after Fiscal Year 2011. Any changes to the timing of reimbursement shall be reflected in future updates to the Financing Plan without further amendment to this Agreement. Subdivider shall not receive cash reimbursement unless and until there are sufficient funds to reimburse Subdivider, in whole or in part, from the FBA. If sufficient funds are unavailable in the FBA, City shall reimburse Subdivider only if and as funds accrue in the FBA. Where FBA credits are requested and approved by City, credit reimbursement shall be made in accordance with the schedule in the Financing Plan. Subdivider acknowledges and agrees that in the event there are no additional FBA funds available for collection by City to fund the Projects, Subdivider shall not be reimbursed by City for any portion of Subdivider's outstanding Project costs or expenditures, and Subdivider expressly agrees to fully absorb all such outstanding costs without any reimbursement from City.
- 13.1.3 **Funds for Reimbursement.** Subdivider shall only be entitled to reimbursement as set forth in this Agreement and only from FBA funds collected by City in accordance with the Financing Plan, as it may be amended, in the amount set forth in this Agreement and only as allocated for Project No. T-4.3 and Project No. P-6 in the Financing Plan, if and as such funds become available, after the appropriate deductions and expenditures are made, pursuant to the method of reimbursement described in Section 13.1.7 and in the priority of reimbursement described in Section 13.1.9.
- 13.1.4 **Amount of Reimbursement.** Subdivider shall be entitled to only Reimbursable Costs as defined in Section 3.2 in an amount not to exceed the Maximum Funds or the Estimated Costs as defined in Section 3.3, whichever is lower.
- 13.1.5 **City's Administrative Costs.** City's Administrative Costs shall be paid prior to any reimbursement to Subdivider and consist of the costs and expenses incurred by City to: (i) implement, process, and administer the Project and verify reimbursement claims, (ii) review and approve the plans and specifications for the Project, (iii) inspect and approve work performed on Project during construction until completion and acceptance of the Project, and (iv) costs associated with setup and operation of a field office, if necessary [City's Administrative Costs]. The City's Administrative Costs are shown for informational purposes in the Estimated Costs attached as **Exhibit F-1** and **Exhibit F-2**.
- 13.1.6 **Interest.** The payment or accrual of interest is not available for reimbursement under this Agreement.

13.1.7 Method of Reimbursement. Subdivider shall submit to City a written Reimbursement Request for all reimbursable costs incurred or advanced for the Projects for which Subdivider was not previously reimbursed or granted FBA credit [Reimbursement Request]. Reimbursement Requests for projects other than those covered by this Agreement must be submitted as separate requests. The Reimbursement Request(s) must also include all relevant documents in accordance with this Section. City shall determine whether additional documentation is needed to support the Reimbursement Request or if the Reimbursement Request is otherwise incomplete, and shall notify Subdivider of such deficiencies within sixty (60) calendar days of Subdivider's Reimbursement Request submittal or resubmittal. Subdivider shall provide additional documentation within fourteen (14) calendar days of City's notification and request. City is not obligated to reimburse Subdivider until City confirms receipt of all relevant documentation sufficient to support the Reimbursement Request. Each time Subdivider provides additional documentation, City shall have an additional sixty (60) calendar day period during which it may request additional documentation to support the Reimbursement Request. However, even if City fails to notify Subdivider within sixty (60) calendar days regarding Subdivider's Reimbursement Request, City may continue to request additional documentation to support the Reimbursement Request and shall not be obligated to reimburse Subdivider until city confirms receipt of all relevant documentation sufficient to support the Reimbursement Request. After all appropriate cost documentation has been received and City approves the Reimbursement Request(s) [Reimbursement Request Approval], City shall reimburse Subdivider for those Reimbursement Costs within ninety (90) calendar days of the date of Reimbursement Request Approval provided that funds are available in the FBA for Project and that the Project is scheduled in the Financing Plan for reimbursement at that time.

13.1.7.1 Withholding. Subject to the limitations of this Article, and at the City's discretion, Subdivider shall be entitled to cash reimbursement or FBA credits, up to twenty-five percent (25%) of the Reimbursable Costs for the Project subject to the Subdivider satisfying all of the following requirements:

- All plans and specifications for the Project have been approved by the City
- Any right-of-way required for the Project has been secured and dedicated
- All required permits and environmental clearances necessary for the Project have been secured
- Provision of all performance bonds, payment bonds, and warranty bonds as described in Article XIX
- Payment of all City fees and costs

- Subdivider has provided evidence satisfactory to the City that it has complied with and satisfied Article VII (Consultant Selection) of the Agreement.

Subdivider shall be entitled to cash reimbursement or FBA credits, up to fifty percent (50%) of the Reimbursable Costs for the Project subject to the Subdivider satisfying all of the above referenced requirements for the twenty-five percent (25%) reimbursement and Subdivider has received valid bids for the Project in accordance with Article V (Competitive Bidding, Equal Opportunity, and Equal Benefits), which have been approved by the City, and has awarded the construction contract. Such cash reimbursement, or FBA credit, shall be based on the Reimbursable Costs.

At the time of Operational Acceptance, Subdivider shall be entitled to cash reimbursement or FBA credits, up to ninety percent (90%) of the Reimbursable Costs for the Project

The remaining ten percent (10%) of the Reimbursable Costs shall be paid to Subdivider upon the recordation by Subdivider of the Notice of Completion and delivery of a conformed copy to City [Final Completion].

- 13.1.7.2 ***Cutoff for Submission of Reimbursement Requests.*** Subdivider shall submit all Reimbursement Requests within six (6) months after the Final Completion of the Project [Cutoff Date]. If the Project includes a Mitigation Monitoring Reporting Program [MMRP] or City-required capital improvements during the applicable warranty period (other than warranty work due to the negligence of Subdivider or Subdivider's agents) for the Project, costs associated with that portion of the Project related to implementation of the same may be submitted until the date that is six (6) months following completion of the work for the same [Extended Cutoff Date]. Any Reimbursement Request submitted after the Cutoff Date or Extended Cutoff Date shall constitute a Non Reimbursable Cost and Subdivider shall not be entitled to any reimbursement for those costs or expenses.

- 13.1.8 ***Verification of Reimbursement Request.*** Subdivider shall on a monthly basis provide reasonably organized documentation to support the Reimbursement Request including, but not limited to, proof that all mechanic liens have been released, copies of invoices received and copies of cancelled checks, substitute checks, or image replacement documents showing that payment has been made in connection with the Reimbursement Request in the following manner:

- 13.1.8.1 Subdivider shall submit two (2) copies of each Reimbursement Request (cover letter, invoice, and documentation) to the City's Facilities Financing Project Manager, who will then provide a copy to the City's Senior Civil Engineer.

- 13.1.8.2 Prior to the approval of the Reimbursement Request, the City's Senior Civil Engineer shall verify whether the materials and work for which reimbursement is being requested have been installed and performed as represented in the Reimbursement Request and shall verify the costs associated with that work.
- 13.1.8.3 For projects under construction, the Resident Engineer in the field (RE) shall review the Project on-site for quality of material and assurance and adherence to bid list, contract estimates and plans and specifications. When applicable, the RE shall also review as-builts and BMPs, and verify that a lien release has been prepared.
- 13.1.8.4 The RE shall initial the Reimbursement Request package, noting any disallowed costs, maintain a copy, and forward a copy to the City's Senior Civil Engineer for review.
- 13.1.8.5 The City's Senior Civil Engineer shall review Project invoices and monitor the RE's expenses charged to the Project, as well as other City Administrative Costs. The City's Senior Civil Engineer shall also serve as the liaison between the RE and the Facilities Financing Project Manager [FF Project Manager].
- 13.1.8.6 After review and approval, the City's Senior Civil Engineer shall prepare a memorandum to Facilities Financing indicating the reimbursement amount that are appropriate to be paid if and as funds become available. The memorandum shall indicate any costs to be disallowed and the reason for the disallowance. The Senior Civil Engineer shall then forward the Reimbursement Request and memorandum to the FF Project Manager.
- 13.1.8.7 The FF Project Manager shall verify that reimbursements are scheduled in the Financing Plan and verify FBA cash/credits are available for reimbursement.
- 13.1.9 ***Priority of Reimbursement.*** Reimbursement to Subdivider from the FBA for the Project will be subsequent to reimbursement of City's Administrative Expenses incurred in connection with the Project or Financing Plan and FBA, but takes priority over any other project scheduled for reimbursement in the Financing Plan after Project No. T.4-3 and Project No. P-6, as applicable, or that is the subject of a reimbursement agreement entered into after the Effective Date of this Agreement., with the following exceptions:
 - 13.1.9.1 Any State or Federally mandated project.
 - 13.1.9.2 Appropriations for City administered, managed, and funded Capital Improvement Project.
 - 13.1.9.3 To the extent Subdivider failed to properly notify City in writing of any actual or anticipated increases in Estimated Costs as required under

Sections 2.6 and 3.4, the reimbursement for the cost increases, if approved by City, will be subsequent in priority to those projects with agreements approved by the City Council prior to the City Council's approval of increased Estimated Costs.

- 13.1.9.4 The FBA identifies another project for funding in an earlier fiscal year than this Project prior to the Effective Date of this Agreement.

ARTICLE XIV. PUBLIC RELATIONS

- 14.1 **Presentations.** Provided the City provides adequate prior written notice to Subdivider and the applicable agent or consultant, Subdivider and Subdivider's agents shall be available for all presentations required to be made to City Council, Council Committees, any other related committees, and citizen groups to provide them with information about the Project as well as presentations to any governing or regulatory body or agency for other approvals as may be required.
- 14.2 **City as Primary Contact.** Subdivider agrees City is the primary contact with the media regarding Project and Subdivider shall forward all questions regarding Project status to the Responsible Department's Senior Public Information Officer.
- 14.3 **Advertising.** Subdivider acknowledges that advertising referring to City as a user of a product, material, or service by Subdivider and/or Subdivider's agents, material suppliers, vendors or manufacturers is expressly prohibited without City's prior written approval.
- 14.4 **Recognition.** Subdivider shall place a sign, placard, or other similar monument on Project site during construction, which shall acknowledge Subdivider's and City's joint efforts in designing and constructing Project, and identifying that Project is funded with FBA funds. Subdivider shall properly recognize City and include City of San Diego's logo on permanent and temporary signs, invitations, flyers, or other correspondence. Any recognition of City shall be reviewed and approved by the Responsible Department's Senior Public Information Officer. For assistance with proper recognition, or if Subdivider is contemplating a dedication or ground breaking ceremony, Subdivider shall contact the Responsible Department's Senior Public Information Officer.
- 14.5 **Dedication Ceremony.** City or Subdivider shall have the opportunity to conduct and host a public dedication ceremony, ground-breaking, or similar ceremony on Project site at any reasonable time following Operational Acceptance of the Project, provided Subdivider receives prior approval from the Engineering & Capital Projects Department for the ceremony and provides an opportunity for appearances by the Mayor, Council Members and other appropriate City officials. Subdivider shall contact the Responsible Department's Senior Public Information Officer to arrange a mutually acceptable date and time for any ceremony. Invitation shall not be sent out or a date set until the Responsible Department's Senior Public Information Officer has approved the time and date for the ceremony.

- 14.6 **Cleanup.** Subdivider shall be responsible for the cleanup of the Project site and the restoration and repair of any damage to Project site attributable to any Subdivider sponsored ceremony.

ARTICLE XV. INSPECTION

- 15.1 **Inspection Team.** Project shall be inspected by a team composed of representatives from (i) the City's Engineering and Capital Project Department, (ii) the Responsible Department, (iii) City's Development Services Department, (iv) Subdivider's consultant(s), and (v) Subdivider's construction superintendent [Inspection Team].
- 15.2 **Inspection Schedule.** Project shall be inspected by Inspection Team in accordance with Exhibit T.

ARTICLE XVI. PROJECT COMPLETION

- 16.1 **Notice to City.** When Subdivider determines the Project is complete, Subdivider shall notify City in writing of the Project's status within seven (7) calendar days of Subdivider's determination. The notice shall certify to City that Project has been completed in accordance with the Construction Documents; all applicable building codes and regulations; all permits; all licenses; all certificates of inspection, use, and occupancy; and ordinances relating to Project.
- 16.2 **Walk-Through Inspection.** A preliminary inspection of the Project [Walk-Through Inspection] shall be conducted by City within fourteen (14) calendar days following Subdivider's notice to City of completion. The Walk-Through Inspection will be conducted by the Inspection Team identified in Section 15.1.
- 16.2.1 **Punch List.** A Punch List shall be prepared by City during the Walk-Through Inspection. The Punch List shall be presented to Subdivider by the RE within five (5) calendar days of the Walk-Through Inspection. Subdivider shall correct the items listed on the Punch List within sixty (60) calendar days of receipt of the Punch List unless Subdivider notifies City in writing that additional time to correct the item is required and Subdivider thereafter diligently pursues the correction of the item. City's Final Inspection of Project (as defined in Section 16.3) shall be conducted as soon as possible, but in no event later than ninety (90) calendar days after written notification by Subdivider to City that Subdivider has corrected all items identified on the Punch List [Notice of Correction].
- 16.2.2 **Failure to Identify Items.** As to any items not included on the Punch List or later discovered, nothing in this Section is intended to limit Subdivider's obligations under this Agreement and City shall maintain all remedies available under this Agreement, at law, or in equity.
- 16.3 **Final Inspection.** The Inspection Team's final inspection of the Project [Final Inspection of Project] shall be scheduled and conducted as soon as possible, but in no event later than ninety (90) calendar days after the Notice of Correction.

ARTICLE XVII. PROJECT ACCEPTANCE

- 17.1 **Acceptance.** Upon Operational Acceptance of the Project, Subdivider shall do all of the following:
- 17.1.1 ***Notice of Completion.*** Subdivider shall execute and file with the County Recorder of San Diego County documentation indicating that the Project and all work depicted on the City Drawing Numbers 32592-D (Road Project) and 32565-D (Park Project) has achieved Final Completion and stipulating the date of the Project completion [Notice of Completion]. Subdivider shall provide the City Engineer and the FF Project Manager with a conformed copy of the recorded Notice of Completion.
- 17.1.2 ***Lien and Material Releases.*** Subdivider shall cause all contractors and subcontractors to provide lien and material releases as to Project and provide copies of such lien and material releases to the City Engineer or, upon approval of City which shall not be unreasonably withheld, provide bonds in lieu of lien and material releases in a form reasonably acceptable to City for all such work.
- 17.1.3 ***Transfer of Ownership.*** The City has conditioned approval of Subdivider's final subdivision map on the dedication of the real property interests required for the Road Project. With respect to the Park Project, Subdivider shall transfer ownership of the Park Project and underlying property to City in a form and manner acceptable to City
- 17.2 **Final Completion.** Final Completion of the Project shall be deemed to occur on the later of: (i) recordation by Subdivider of the Notice of Completion and delivery of a conformed copy to City; or (ii) submission of all documents required to be supplied by Subdivider to City pursuant to this Agreement, including As-Built Drawings, warranties, operating and maintenance manuals and other Deliverables identified in **Exhibit U**. Upon final completion, Subdivider shall provide to the FF Project Manager the same with a conformed copy of the recorded Notice of Completion.
- 17.2.1 ***As-Builts.*** City, including but not limited to, Engineering and Capital Projects Department, will evaluate the submitted As-Builts for accuracy and completeness and may return comments. Subdivider shall meet with City until all issues are resolved. Upon issue resolution, Subdivider shall submit a mylar set, a digital copy (pdf), and three (3) final blue-line sets of As-Builts stamped by the architect/engineer of record as required by law.
- 17.3 **No Waiver.** Subdivider's obligation to perform and complete the Project in accordance with this Agreement and the Construction Documents shall be absolute. Neither recommendation of any progress payment or acceptance of work, nor any payment by City to Subdivider under this Agreement, nor any use or occupancy of the Project or any part thereof by City, nor any act of acceptance by City, nor any failure to act, nor any review of a shop drawing or sample submittal will constitute an acceptance of work which is not in accordance with the Construction Documents.

- 17.4 **Assignment of Rights.** Upon Final Completion of the Project, Subdivider shall non-exclusively assign its rights under its contracts with all contractors, subcontractors, design professionals, engineers, and material suppliers associated with Project to City. Subdivider shall be required to obtain written approval and acknowledgement, whether in the form of a contract provision or separate document, of such assignment from its contractors, subcontractors, design professionals, engineers, and material suppliers. This assignment of rights shall not relieve Subdivider of its obligations under this Agreement, and such obligations shall be joint and several.

ARTICLE XVIII. PROJECT DELIVERABLES

- 18.1 **Project Deliverables.** Prior to Final Completion, Subdivider shall deliver to City "As-Builts" and related plans and specifications, operating manuals, warranty materials, and all other materials required by City in the format requested. Documents shall include those listed in Exhibit U.
- 18.2 **Ownership of Project Deliverables.** Upon Final Completion or termination, Project Deliverables shall become the property of City. Subdivider and City mutually agree that this Agreement, Construction Documents, and Project Deliverables for Project shall not be used on any other work without the consent of each Party.

ARTICLE XIX. BONDS [LOC, CASH OR OTHER ACCEPTABLE SECURITY]

- 19.1 **Payment Bond.** Subdivider shall provide or require its construction contractor to provide City with a payment bond, a letter of credit [LOC], cash or other security acceptable to the City for material and labor in favor of City for 100% of the proposed construction costs, as determined by competitive bidding [Payment Bond].
- 19.2 **Performance Bond.** Subdivider shall provide or require its construction contractor to provide City with a bond, a LOC, cash or other security acceptable to the City guaranteeing performance in favor of City for 100% of the proposed construction costs, as determined by competitive bidding [Performance Bond].
- 19.3 **Warranty Bond.** Subdivider shall provide or require its construction contractor to provide City with a bond, a LOC, cash or other security acceptable to the City guaranteeing Project during the warranty period in favor of City [Warranty Bond]. Subdivider shall provide the Warranty Bond to City upon release of the Performance Bond or commencement of the warranty periods, whichever occurs first.
- 19.4 **Term.** The Payment Bond shall remain in full force and effect until Final Completion to ensure that all claims for materials and labor are paid, except as otherwise provided by law or regulation. The Performance Bond shall remain in full force and effect until Operational Acceptance of the Project by City. Upon Operational Acceptance, City shall follow the procedures outlined in California Government Code section 66499.7 and release the Performance Bond. The Warranty Bond shall remain in full force and effect for the warranty periods provided in this Agreement.

- 19.5 **Certificate of Agency.** All bonds signed by an agent must be accompanied by a certified copy of such agent's authority to act.
- 19.6 **Licensing and Rating.** The bonds shall be duly executed by a responsible surety company admitted to do business in the State of California, licensed or authorized in the jurisdiction in which Project is located to issue bonds for the limits required by this Agreement, and have a minimum AM Best rating of "A-" to an amount not to exceed ten percent (10%) of its capital and surplus.
- 19.7 **Insolvency or Bankruptcy.** If the surety on any bond furnished by the construction contractor is declared bankrupt or becomes insolvent or its right to do business is terminated in any state where any part of the Project is located, Subdivider shall within seven (7) calendar days thereafter substitute or require the substitution of another bond and surety, acceptable to City.

ARTICLE XX. INDEMNITY & DUTY TO DEFEND

- 20.1 **Indemnification and Hold Harmless Agreement.** Other than in the performance of design professional services which shall be solely as addressed in Sections 20.2 and 20.3 below, to the fullest extent permitted by law, Subdivider shall defend (with legal counsel reasonably acceptable to the City), indemnify and hold harmless the City and its officers, agents, departments, officials, and employees [Indemnified Parties] from and against all claims, losses, costs, damages, injuries (including, without limitation, injury to or death of an employee of Subdivider or its subcontractors, agents, subagents and consultants), expense and liability of every kind, nature and description (including, without limitation, incidental and consequential damages, court costs, attorney's fees, litigation expenses and fees of expert consultants or expert witnesses incurred in connection therewith and costs of investigation) that arise out of, pertain to, or relate to, directly or indirectly, in whole or in part, any services performed under this Agreement by Subdivider, any subcontractor, anyone directly or indirectly employed by them, or anyone they control. Subdivider's duty to defend, indemnify, protect and hold harmless shall not include any claims or liabilities arising from the active negligence, sole negligence or willful misconduct of the Indemnified Parties.
- 20.2 **Indemnification for Design Professional Services.** To the fullest extent permitted by law (including, without limitation, California Civil Code section 2782.8), with respect to the performance of design professional services, Design Professional shall indemnify and hold harmless the City, its officers, and/or employees, from all claims, demands or liability that arise out of, pertain to or relate to the negligence, recklessness, or willful misconduct of Design Professional or Design Professional's officers or employees.
- 20.3 **Design Professional Services Defense.** Parties will work in good faith to procure applicable insurance coverage for the cost of any defense arising from all claims, demands or liability that arise out of, pertain to or relate to the negligence, recklessness, or willful misconduct of Design Professional or Design Professional's officers or employees.

- 20.4 **Insurance.** The provisions of this Article are not limited by the requirements of Article XXI related to insurance.
- 20.5 **Indemnification for Liens and Stop Notices.** Subdivider shall keep the Project and underlying property free of any mechanic's liens and immediately secure the release of any stop notices. Subdivider shall defend, indemnify, protect, and hold harmless, City, its agents, officers and employees from and against any and all liability, claims, costs, and damages, including but not limited to, attorney fees, arising from or attributable to a failure to pay claimants. Subdivider shall be responsible for payment of all persons entitled to assert liens and stop notices.
- 20.6 **Enforcement Costs.** Subdivider agrees to pay any and all costs City incurs to enforce the indemnity and defense provisions set forth in this Article.

ARTICLE XXI. INSURANCE

- 21.1 **General.** Subdivider shall not begin work on Project under this Agreement until it has: (i) obtained, and upon City's request provided to City, insurance certificates reflecting evidence of all insurance required in this Article; (ii) obtained City approval of each company or companies; and (iii) confirmed that all policies contain specific provisions required by City pursuant to this Article.
- 21.2 **Type and Amount of Insurance.** The City Attorney shall confer with the City's Risk Management Department and determine the appropriate dollar amount and type of insurance, including any endorsements or specific clauses, necessary for the Project [Required Insurance]. Subdivider shall obtain the Required Insurance prior to the commencement of construction. City's standard insurance provisions are attached as **Exhibit V**. If Subdivider is not informed otherwise in writing of Required Insurance, City's standard insurance provisions included in **Exhibit V** shall be the Required Insurance for the Project.
- 21.3 **Written Notice.** Except as provided for under California law, any Required Insurance shall not be canceled, non-renewed or materially changed except after thirty (30) calendar days prior written notice by Subdivider to City by certified mail, except for non-payment of premium, in which case ten (10) calendar days notice shall be provided.
- 21.3.1 Where the words "will endeavor" and "but failure to mail such notice *shall* impose no obligation or liability of any kind upon the company, its agents, or representatives" are present on a certificate, they shall be deleted.
- 21.4 **Rating Requirements.** Except for the State Compensation Insurance Fund, all insurance required by express provision of this Agreement shall be carried only by responsible insurance companies that have been given at least an "A" or "A-" and "VI" rating by AM BEST, that are authorized by the California Insurance Commissioner to do business in the State of California, and that have been approved by City.

- 21.5 **Non-Admitted Carriers.** City will accept insurance provided by non-admitted, "surplus lines" carriers only if the carrier is authorized to do business in the State of California and is included on the List of Eligible Surplus Lines Insurers.
- 21.6 **Additional Insurance.** Subdivider may obtain additional insurance not required by this Agreement.
- 21.7 **Obligation to Provide Documents.** Prior to performing any work on Project, Subdivider shall provide copies of documents including but not limited to certificates of insurance and endorsements, and shall furnish renewal documentation prior to expiration of insurance. Each required document shall be signed by the insurer or a person authorized by the insurer to bind coverage on its behalf. City reserves the right to require complete, certified copies of all insurance policies required herein.
- 21.8 **Deductibles/Self Insured Retentions.** All deductibles and self-insurance retentions on any policy shall be the responsibility of Subdivider. Deductibles and self-insurance retentions shall be disclosed to City at the time the evidence of insurance is provided.
- 21.9 **Policy Changes.** Subdivider shall not modify any policy or endorsement thereto which increases City's exposure to loss for the duration of this Agreement.
- 21.10 **Reservation of Rights.** City reserves the right, from time to time, to review the Subdivider's insurance coverage, limits, deductible and self insured retentions to determine if they are acceptable to City. City will reimburse the Subdivider for the cost of the additional premium for any coverage-requested by City in excess of that required by this Agreement without overhead, profit, or any other markup.
- 21.11 **Not a Limitation of Other Obligations.** Insurance provisions under this Article shall not be construed to limit Subdivider's obligations under this Agreement, including indemnity.
- 21.12 **Material Breach.** Failure to maintain, renew, or provide evidence of renewal of required insurance during the term of this Agreement and for a period of ten (10) years following Operational Acceptance of the Project may be treated by City as a material breach of this Agreement.

ARTICLE XXII. WARRANTIES

- 22.1 **Warranties Required.** Subdivider shall require the construction contractor and its subcontractors and agents provide the warranties listed below. This warranty requirement is not intended to exclude, and shall not exclude, other implicit or explicit warranties or guarantees required or implied by law. All such warranties shall be enforceable by and inure to the benefit of City.
- 22.1.1 **Materials and Workmanship.** All work on Project shall be guaranteed against defective workmanship and all materials furnished by construction contractor or its agents shall be guaranteed against defects for a period of one (1) year from the date of Operational Acceptance. Construction contractor shall replace or repair or

require its agents to replace or repair any such Defective Work or materials in a manner satisfactory to City, after notice to do so from City, and within the time specified in the notice.

22.1.2 ***New Materials and Equipment.*** Construction contractor shall warrant and guarantee, and shall require its agents to warrant and guarantee, all materials and equipment incorporated into Project are new unless otherwise specified.

22.1.3 ***Design, Construction, and Other Defects.*** Construction contractor shall warrant and guarantee, and shall require its agents to warrant and guarantee, all work is in accordance with the plans and specifications and is not defective in any way in design, construction or otherwise.

22.2 **Form and Content.** Except manufacturer's standard printed warranties, all warranties shall be on Subdivider's and/or Subdivider's agents, material supplier's, installer's or manufacturer's own letterhead, addressed to City. All warranties shall be submitted in the format specified in this Section.

22.2.1 ***Durable Binder.*** Obtain warranties, executed in triplicate by Subdivider, Subdivider's agents, installers, and manufacturers. Provide table of contents and assemble in binder with durable plastic cover.

22.2.2 ***Table of Contents.*** All warranties shall be listed and typewritten in the sequence of the table of contents of the Project manual, with each item identified with the number and title of the specification section in which specified, and the name of product or work item.

22.2.3 ***Index Tabs.*** Each warranty shall be separated with index tab sheets keyed to the table of contents listing.

22.2.4 ***Detail.*** Provide full information, using separate typewritten sheets, as necessary. List Subdivider's agents, installer, and manufacturer, with name, address and telephone number of responsible principal.

22.2.5 ***Warranty Start Date.*** This date shall be left blank until Final Completion.

22.2.6 ***Signature and Notarization.*** All warranties shall be signed and notarized. Signatures shall be required from Subdivider's construction contractor and where appropriate, the responsible subcontractor.

22.3 **Term of Warranties.** Unless otherwise specified or provided by law or in this Agreement, all warranties shall extend for a term of one (1) year from the date of Operational Acceptance.

22.4 **Meetings.** During the one (1) year warranty period described in Section 22.3, Subdivider shall meet and shall require its design consultant, construction contractor, and key subcontractors to meet, with City representatives, including the Engineering and Capital Projects Project Manager and one or more Responsible Department representatives, on a

monthly basis, if requested by City, to discuss and resolve any problems City discovers in design, construction, or furnishing, fixtures, and equipment of the Project during the one (1) year warranty period.

ARTICLE XXIII. DEFECTIVE WORK

- 23.1 **Correction, Removal, or Replacement.** All work, material, or equipment that is unsatisfactory, faulty, incomplete, or does not conform to the Construction Documents is defective [Defective Work]. If within the designated warranty period, or such additional period as may be required by law or regulation, Project is discovered to contain Defective Work, Subdivider shall promptly and in accordance with City's written instructions and within the reasonable time limits stated therein, either correct the Defective Work, or if it has been rejected by City, remove it from the site and replace it with non-defective and conforming work.
- 23.2 **City's Right to Correct.** If circumstances warrant, including an emergency or Subdivider's failure to adhere to Section 23.1, City may correct, remove, or replace the Defective Work. In such circumstances, Subdivider shall not recover costs associated with the Defective Work and shall reimburse City for all City's costs, whether direct or indirect, associated with the correction or removal and replacement.
- 23.3 **Defects Constitute Non-Reimbursable Costs.** All costs incurred by Subdivider or Subdivider's agents to remedy Defective Work are Non-Reimbursable Costs. If City has already reimbursed Subdivider for Defective Work, and Subdivider fails to correct that work as provided for in Section 23.1 hereof, City is entitled to an appropriate decrease in Reimbursable Costs, to withhold a setoff against the amount, or to make a claim against Subdivider's bond if Subdivider has been paid in full.
- 23.4 **Extension of Warranty.** When Defective Work, or damage there from, has been corrected, removed, or replaced during the warranty period, the one (1) year, or relevant warranty period, with respect to the Defective Work shall be extended for an additional one (1) year from the date of the satisfactory completion of the correction, removal, or replacement.
- 23.5 **No Limitation on other Remedies.** Exercise of the remedies for Defective Work pursuant to this Article shall not limit the remedies City may pursue under this Agreement, at law, or in equity.
- 23.6 **Resolution of Disputes.** If Subdivider and City are unable to reach agreement on disputed Defective Work, City may at any time direct Subdivider to stop work. If the amount in dispute is less than ten percent (10%) of the Estimated Costs, City may direct Subdivider to proceed with the work. Regardless of the existence of any dispute, the City shall compensate Subdivider for undisputed amounts. Payment of disputed amounts shall be as later determined by the Parties, mediation or as subsequently adjudicated or established in a court of law. Subdivider shall maintain and keep all records relating to disputed work in accordance with Article XXV.

- 23.7 **Prior to Operational Acceptance and Reimbursement to Subdivider.** Where Defective Work has been identified prior to the Operational Acceptance of the Project, Subdivider shall:

23.7.1 **Correct, Remove, or Replace.** Subdivider shall promptly and within a reasonable time, either correct the Defective Work, or if it has been rejected by City, remove it from the site and replace it with conforming work. Costs incurred to remedy Defective Work are Non-Reimbursable Costs. Where Defective Work is not remedied, City is entitled to an appropriate decrease in Reimbursable Costs, to withhold a setoff against the amount paid, or make a claim against the construction contractor's bond.

ARTICLE XXIV. MAINTENANCE OF LANDSCAPING & IRRIGATION WORK

- 24.1 **Maintenance Period.** If the construction contractor is required to install or maintain landscaping and/or irrigation, Subdivider shall require the construction contractor provide a maintenance period to begin on the first day after all landscape and irrigation work on Project is complete, checked, approved by City, and City has given written approval to begin the maintenance period, and shall continue until ninety (90) calendar days after the date of Final Completion or ninety (90) calendar days after the date of the date the Landscaping and Irrigation is accepted, whichever is longer.
- 24.2 **Maintenance Area.** Subdivider shall require the construction contractor maintain all areas of the Project, including areas impacted or disturbed by the Project.
- 24.3 **Maintenance Required.** Subdivider shall require the construction contractor conduct regular planting maintenance operations immediately after each plant is planted. Plants shall be kept in a healthy growing condition and in a visually pleasing appearance by watering, pruning, mowing, rolling, trimming, edging, fertilizing, restaking, pest and disease controlling, spraying, weeding, cleaning up and any other necessary operation of maintenance. Landscape areas shall be kept free of weeds, noxious grass and all other undesired vegetative growth and debris. Construction contractor shall replace all plants found to be dead or in an impaired condition within fourteen (14) calendar days. Maintenance shall also include the following: (1) filling and replanting of any low areas that may cause standing water (2) adjusting of sprinkler head height and watering pattern, (3) filling and recompaction of eroded areas, (4) weekly removal of trash, litter, clippings and foreign debris, (5) inspecting plants at least twice per week, and (6) protecting all planting areas against traffic or other potential causes of damage.
- 24.4 **Landscape and Irrigation Inspection.** At the conclusion of the maintenance period, City shall inspect the landscaping and irrigation to determine the acceptability of the work, including maintenance. This inspection shall be scheduled with two (2) weeks notice, a minimum of eighty (80) calendar days after the plant maintenance period commencement, or when Subdivider or Subdivider's contractor notifies City they are ready for the Final Inspection, whichever comes last. The City will notify Subdivider of all deficiencies revealed by the inspection before acceptance.

- 24.5 **Extension of Maintenance Period.** Subdivider shall require the construction contractor extend completion of the maintenance period when in City's opinion improper maintenance and/or possible poor or unhealthy condition of planted material is evident at the termination of the scheduled maintenance period. Subdivider shall require the construction contractor accept responsibility for additional maintenance of the work until all of the work is completed and acceptable. Additional costs for failure to maintain landscaping during the maintenance period are Non-Reimbursable Costs.
- 24.6 **Replacement.** Plants found to be dead or not in a vigorous condition, or if root balls have been damaged, within the installation, maintenance and guarantee periods, shall be replaced within fourteen (14) calendar days of notification by City. Subdivider shall require the construction contractor include, at construction contractor's expense, a timely written diagnosis of plant health by a certified arborist, should a dispute arise. An arborist's report shall indicate reason for lack of vigor, potential remedies, if any, and estimate of time required to regain vigor and specified size.
- 24.6.1 ***Same Kind and Size.*** Plants used for replacement shall be of the same kind and size as specified and shall be furnished, planted and fertilized as originally specified, unless otherwise directed in writing by City. Subdivider shall require the cost of all repair work to existing improvements damaged during replacements be borne by the construction contractor. Costs of replacement are Non-Reimbursable Costs.

ARTICLE XXV. RECORDS AND AUDITS

- 25.1 **Retention of Records.** Subdivider, consultants, contractors, and subcontractors shall maintain data and records related to this Project and Agreement for a period of not less than five (5) years following the Effective Date of this Agreement.
- 25.2 **Audit of Records.** At any time during normal business hours and as often as City deems necessary, Subdivider and all contractors or subcontractors shall make available to City for examination at reasonable locations within the City/County of San Diego all of the data and records with respect to all matters covered by this Agreement. Subdivider and all contractors or subcontractors will permit City to make audits of all invoices, materials, payrolls, records of personnel, and other data and media relating to all matters covered by this Agreement. If records are not made available within the City/County of San Diego, then Subdivider shall pay all City's travel related costs to audit the records associated with this Agreement at the location where the records are maintained. All such costs are Non-Reimbursable Costs.
- 25.3 **Costs.** Subdivider and Subdivider's agents shall allow City to audit and examine books, records, documents, and any and all evidence and accounting procedures and practices that City determines are necessary to discover and verify all costs of whatever nature, which are claimed to have been incurred, anticipated to be incurred, or for which a claim for additional compensation or for Extra Work have been submitted under this Agreement.

ARTICLE XXVI. NOTICES

- 26.1 **Writing.** Any demand upon or notice required or permitted to be given by one Party to the other Party shall be in writing.
- 26.2 **Effective Date of Notice.** Except in relation to Change Orders as provided for in Section 3.3.3 or as otherwise provided by law, any demand upon or notice required or permitted to be given by one Party to the other Party shall be effective: (1) on personal delivery, (2) on the second business day after mailing by Certified or Registered U.S. Mail, Return Receipt Requested, (3) on the succeeding business day after mailing by Express Mail or after deposit with a private delivery service of general use (e.g., Federal Express) postage or fee prepaid as appropriate, or (4) upon documented successful transmission of facsimile.
- 26.3 **Recipients.** All demands or notices required or permitted to be given to City or Subdivider shall be sent to all of the following:
- 26.3.1 Director, Engineering & Capital Projects Department
City of San Diego
City Administration Building
202 C Street, M.S. #9B
San Diego, California 92101
Facsimile No: (619) 533-4736
- 26.3.2 Facilities Financing Manager
Development Services Department
City of San Diego
1010 Second Avenue, Suite 600 M.S. #606F
San Diego, California 92101
Facsimile No: (619) 533-3687
- 26.3.3 MREC – Davidson Fairbanks LLC
c/o Mr. Michael Levesque
Davidson Communities
1302 Camino Del Mar
Del Mar, CA 92014
Facsimile No: (858) 259-4647
- 26.3.4 MREC – Davidson Fairbanks LLC
c/o Mr. Bill Davidson
Davidson Communities
1302 Camino Del Mar
Del Mar, CA 92014
Facsimile No: (858) 259-4647

26.3.5 Brian C. Fish, Esq.
Luce, Forward, Hamilton & Scripps LLP
600 West Broadway, Suite 2600
San Diego, CA 92101
Facsimile No: (619) 645-5395

26.4 **Recipients of Change Orders.**

Any and all notices related to Change Orders as provided in Section 3.3.3 shall be sent to all of the recipients identified in Section 26.3 and to:

26.4.1 Deputy Director, Engineering & Capital Projects, Field Division
City of San Diego
9485 Aero Drive
San Diego, CA 92123
Facsimile No: (858) 627-3297

26.5 **Change of Address(es).** Notice of change of address shall be given in the manner set forth in Article XXVI.

ARTICLE XXVII. MEDIATION

27.1 **Mandatory Mediation.** If dispute arises out of, or relates to the Project or this Agreement, or the breach thereof, and if said dispute cannot be settled through normal contract negotiations, prior to the initiation of any litigation, the Parties agree to attempt to settle the dispute in an amicable manner, using mandatory mediation under the Construction Industry Mediation Rules of the American Arbitration Association [AAA] or any other neutral organization agreed upon before having recourse in a court of law.

27.2 **Mandatory Mediation Costs.** The expenses of witnesses for either side shall be paid by the Party producing such witnesses. All other expenses of the mediation, including required traveling and other expenses of the mediator [Mediator], and the cost of any proofs or expert advice produced at the direct request of the Mediator, shall be borne equally by the Parties, unless they agree otherwise.

27.3 **Selection of Mediator.** A single Mediator that is acceptable to both Parties shall be used to mediate the dispute. The Mediator will be knowledgeable in construction aspects and may be selected from lists furnished by the AAA or any other agreed upon Mediator. To initiate mediation, the initiating Party shall serve a Request for Mediation on the opposing Party. If the Mediator is selected from a list provided by AAA, the initiating Party shall concurrently file with AAA a "Request for Mediation" along with the appropriate fees, a list of three requested Mediators marked in preference order, and a preference for available dates.

27.3.1 If AAA is selected to coordinate the mediation [Administrator], within fourteen calendar days from the receipt of the initiating Party's Request for Mediation, the opposing Party shall file the following: a list of preferred Mediators listed in preference order after striking any Mediators to which they have any factual

objection, and a preference for available dates. If the opposing Party strikes all of initiating Party's preferred Mediators, opposing Party shall submit a list of three preferred Mediators listed in preference order to initiating Party and Administrator. Initiating Party shall file a list of preferred Mediators listed in preference order, after striking any Mediator to which they have any factual objection. This process shall continue until both sides have agreed upon a Mediator.

27.3.2 The Administrator will appoint or the Parties shall agree upon the highest, mutually preferred Mediator from the individual Parties' lists who is available to serve within the designated time frame.

27.3.3 If the Parties agree not to use AAA, then a Mediator, date and place for the mediation shall be mutually agreed upon.

27.4 **Conduct of Mediation Sessions.** Mediation hearings will be conducted in an informal manner and discovery will not be allowed. All discussions, statements, or admissions will be confidential to the Party's legal position. The Parties may agree to exchange any information they deem necessary.

27.4.1 Both Parties must have an authorized representative attend the mediation. Each representative must have the authority to recommend entering into a settlement. Either Party may have attorney(s) or expert(s) present. Upon reasonable demand, either Party may request and receive a list of witnesses and notification whether attorney(s) will be present.

27.4.2 Any agreements resulting from mediation shall be documented in writing. All mediation results and documentation, by themselves, shall be "non-binding" and inadmissible for any purpose in any legal proceeding, unless such admission is otherwise agreed upon, in writing, by both Parties. Mediators shall not be subject to any subpoena or liability and their actions shall not be subject to discovery.

ARTICLE XXVIII. MISCELLANEOUS PROVISIONS

28.1 **Drug-Free Workplace.** Subdivider shall comply with City's requirements in Council Policy 100-17, "DRUG-FREE WORKPLACE," adopted by San Diego Resolution R-277952 and fully incorporated into this Agreement by reference. Subdivider shall certify to City that it will provide a drug-free workplace by submitting a Certification for a Drug-Free Workplace in the form and content of **Exhibit W**. Subdivider shall include in each of its contracts with its contractors, and shall require its contractors to include in each of its subcontracts, language which indicates the contractor's or subcontractor's agreement to abide by the provisions of subdivisions (1) through (3) of Section 2A of Council Policy 100-17.

28.2 **ADA Certification.** Subdivider shall comply with the City's Americans With Disabilities Act Compliance/City Contracts requirements set forth in Council Policy 100-04, adopted by San Diego Resolution R-282153 and incorporated into this Agreement by this reference.

- 28.3 **Term of Agreement.** Following the adoption of the City Council Resolution authorizing this Agreement and the subsequent execution of the same by the Parties, this Agreement shall be effective upon the date it is executed by City Attorney in accordance with San Diego Charter section 40 [Effective Date.] Unless otherwise terminated, the Agreement shall be effective until (i) the final reimbursement payment is made; or (ii) one year after the Warranty Bond terminates, whichever is later but not to exceed five years unless approved by City ordinance.
- 28.4 **Construction Documents.** Construction documents include, but are not limited to: construction contract, contract addenda, notice inviting bids, instructions to bidders, bid (including documentation accompanying bid and any post-bid documentation submitted prior to notice of award), the bonds, the general conditions, permits from other agencies, the special provisions, the plans, standard plans, standard specifications, reference specifications, and all modifications issued after the execution of the construction contract.
- 28.5 **Headings.** All article headings are for convenience only and shall not affect the interpretation of this Agreement.
- 28.6 **Gender & Number.** Whenever the context requires, the use herein of (i) the neuter gender includes the masculine and the feminine genders, and (ii) the singular number includes the plural number.
- 28.7 **Reference to Paragraphs.** Each reference in this Agreement to a Section refers, unless otherwise stated, to a Section of this Agreement.
- 28.8 **Incorporation of Recitals.** All Recitals herein are true and correct to the Parties' best knowledge and belief, and are fully incorporated into this Agreement by reference and are made a part hereof.
- 28.9 **Covenants and Conditions.** All provisions of this Agreement expressed as either covenants or conditions on the part of City or Subdivider shall be deemed to be both covenants and conditions.
- 28.10 **Integration.** This Agreement and all Exhibits and references incorporated into this Agreement fully express all understandings of the Parties concerning the matters covered in this Agreement. No change, alteration, or modification of the terms or conditions of this Agreement, and no verbal understanding of the Parties, their officers, agents, or employees shall be valid unless made in the form of a written change agreed to in writing by both Parties or a written amendment to this Agreement agreed to by both Parties. All prior negotiations and agreements are merged into this Agreement.
- 28.11 **Severability.** The unenforceability, invalidity, or illegality of any provision of this Agreement shall not render any other provision of this Agreement unenforceable, invalid, or illegal.
- 28.12 **Drafting Ambiguities.** The Parties acknowledge they each have been fully advised by their own counsel with respect to the negotiations, terms, and conditions of this

Agreement. This Agreement shall not be construed in favor of or against either Party by reason of the extent to which each Party participated in the drafting of the Agreement.

- 28.13 **Conflicts Between Terms.** If an apparent conflict or inconsistency exists between the main body of this Agreement and the Exhibits, the main body of this Agreement shall control. If a conflict exists between an applicable federal, state, or local law, rule, regulation, order, or code and this Agreement, the law, rule, regulation, order, or code shall control. Varying degrees of stringency among the main body of this Agreement, the exhibits, and laws, rules, regulations, orders, or codes are not deemed conflicts, and the most stringent requirement shall control. Each Party shall notify the other immediately upon the identification of any apparent conflict or inconsistency concerning this Agreement.
- 28.14 **Prompt Performance.** Time is of the essence of each covenant and condition set forth in this Agreement.
- 28.15 **Good Faith Performance.** The Parties shall cooperate with each other in good faith, and assist each other in the performance of the provisions of this Agreement.
- 28.16 **Further Assurances.** City and Subdivider each agree to execute and deliver such additional documents as may be required to effectuate the purposes of this Agreement.
- 28.17 **Exhibits.** Each of the Exhibits described below, and referenced and attached to this Agreement, is fully incorporated herein by reference.

Exhibit A	-	Vesting Tentative Map No. 99-0329
Exhibit B	-	Description of Project
Exhibit C-1	-	Depiction of Road Project
Exhibit C-2	-	Depiction of Park Project
Exhibit D-1	-	Financing Plan Description of Project No. T-4.3
Exhibit D-2	-	Proposed Financing Plan Description of Project No. T-4.3
Exhibit D-3	-	Financing Plan Description of Project No. P-6
Exhibit E	-	Project Schedule
Exhibit F-1	-	Estimated Costs (Road Project)
Exhibit F-2	-	Estimated Costs (Park Project)
Exhibit G	-	Project Schedule Obligations and Components
Exhibit H	-	Meeting Requirements
Exhibit I	-	Preconstruction, Progress & Special Meeting Agenda
Exhibit J	-	Procedure for Processing Change Orders
Exhibit K	-	Equal Benefits Ordinance Certification of Compliance
Exhibit L	-	Consultant Provisions
Exhibit M	-	Design and Construction Standards
Exhibit N	-	Certificate for Title 24/ADA Compliance
Exhibit O	-	Approval of Design, Plans, and Specifications
Exhibit P	-	Construction Obligations
Exhibit Q	-	Product Submittal and Substitution
Exhibit R	-	Extra Work Provisions

Exhibit S	-	Notification of Reimbursable Project
Exhibit T	-	Inspection Schedule
Exhibit U	-	Project Deliverables
Exhibit V	-	Typical Insurance Provisions
Exhibit W	-	Certification for a Drug-Free Workplace

- 28.18 **Compliance with Controlling Law.** Subdivider shall require its consultants, contractors, subcontractors, agents, and employees to comply with all laws, statutes, resolutions, ordinances, regulations, and policies of the federal, state, and local governments applicable to this Agreement (and if expressly made applicable by the City Council, California Labor Code section 1720 as amended in 2000 relating to the payment of prevailing wages during the design and preconstruction phases of the Project), including inspection and land surveying work. In addition, Subdivider shall require its consultants, contractors, subcontractors, agents, and employees comply immediately with all directives issued by City or its authorized representatives under authority of any laws, statutes, resolutions, ordinances, rules, regulations or policies.
- 28.19 **Hazardous Materials.** Hazardous Materials constitute any hazardous waste or hazardous substance as defined in any federal, state, or local statute, ordinance, rule, or regulation applicable to Property, including, without limitation the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (Title 42 United States Code sections 9601-9675), the Resource Conservation and Recovery Act (Title 42 United States Code sections 6901-6992k), the Carpenter Presley-Tanner Hazardous Substance Account Act (Health and Safety Code sections 25300-25395.15), and the Hazardous Waste Control Law (Health and Safety Code sections 25100-25250.25). Subdivider agrees to comply with all applicable state, federal and local laws and regulations pertaining to Hazardous Materials.
- 28.20 **Jurisdiction, Venue, Choice of Law, and Attorney Fees.** The venue for any suit or proceeding concerning this Agreement, including the interpretation or application of any of its terms or any related disputes, shall be in the County of San Diego, State of California. This Agreement is entered into and shall be construed and interpreted in accordance with the laws of the State of California. The prevailing Party in any such suit or proceeding shall be entitled to a reasonable award of attorney fees in addition to any other award made in such suit or proceeding.
- 28.21 **Municipal Powers.** Nothing contained in this Agreement shall be construed as a limitation upon the powers of the City as a chartered city of the State of California.
- 28.22 **Third-Party Relationships.** Nothing in this Agreement shall create a contractual relationship between City and any third-party; however, the Parties understand and agree that City, to the extent permitted by law, is an intended third-party beneficiary of all Subdivider's contracts, purchase orders and other contracts between Subdivider and third-party services. Subdivider shall incorporate this provision into its contracts, supply agreements and purchase orders.

- 28.23 **Non-Assignment.** Except with respect to Permitted Transfers, the Subdivider shall not assign any or all of the obligations under this Agreement, nor any monies due or to become due, without City's prior written approval. Permitted Transfers include assignments to affiliates that are under Subdivider's control. The term "control" as used in the immediately preceding sentence, means the power to direct the affiliate's management or the power to control the appointment or election of the board of directors or other governing body of the affiliate. Permitted Transfers are subject to the reasonable approval of documentation, by the Mayor or his designee, substantiating that the assignment is a Permitted Transfer. If the Mayor or his designee has not acted on a notification of a Permitted Transfer within ten (10) business days, the Permitted Transfer shall be deemed to be acceptable. City reserves the right to require where deemed appropriate by the City, as a condition precedent to the completion of any Permitted Transfer, and any other assignment or transfer approved by the City, an executed assignment and assumption agreement confirming that the assignee has assumed the obligations under this Agreement. Any assignment in violation of this Section shall constitute a Default and is grounds for immediate termination of this Agreement, at the sole discretion of City. In no event shall any putative assignment create a contractual relationship between City and any putative assignee.
- 28.24 **Successors in Interest.** This Agreement and all rights and obligations created by this Agreement shall be in force and effect whether or not any Parties to the Agreement have been succeeded by another entity, and all rights and obligations created by this Agreement shall be vested and binding on any Party's successor in interest.
- 28.25 **Independent Contractors.** The Subdivider, any consultants, contractors, subcontractors, and any other individuals employed by Subdivider shall be independent contractors and not agents of City. Any provisions of this Agreement that may appear to give City any right to direct Subdivider concerning the details of performing the work or services under this Agreement, or to exercise any control over such performance, shall mean only that Subdivider shall follow the direction of City concerning the end results of the performance.
- 28.26 **Approval.** Where the consent or approval of a Party is required or necessary under this Agreement, the consent or approval shall not be unreasonably withheld; however, nothing in this Section shall in any way bind or limit any future action of the City Council pertaining to this Agreement or Project.
- 28.27 **No Waiver.** No failure of either City or Subdivider to insist upon the strict performance by the other of any covenant, term, or condition of this Agreement, nor any failure to exercise any right or remedy consequent upon a breach of any covenant, term, or condition of this Agreement, shall constitute a waiver of any such breach of such covenant, term or condition. No waiver of any breach shall affect or alter this Agreement, and each and every covenant, condition, and term hereof shall continue in full force and effect to any existing or subsequent breach.
- 28.28 **Signing Authority.** The representative for each Party signing on behalf of a corporation, partnership, joint venture or governmental entity hereby declares that authority has been

duly obtained to sign on behalf of the corporation, partnership, joint venture, or entity and agrees to hold the other Party or Parties hereto harmless if it is later determined that such authority does not exist.

- 28.29 **Remedies.** Notwithstanding any other remedies available to City at law or in equity, Subdivider understands that its failure to comply with the insurance requirements or other obligations required by this Agreement, and/or submitting false information in response to these requirements, may result in withholding reimbursement payments until Subdivider complies and/or may result in suspension from participating in future city contracts as a developer, prime contractor or consultant for a period of not less than one (1) year. For additional or subsequent violations, the period of suspension may be extended for a period of up to three (3) years.

IN WITNESS WHEREOF, this agreement is executed by the City of San Diego, acting by the through its Mayor, pursuant to Resolution No. R- 307252, authorizing such execution, and by Subdivider, as well as their respective counsel.

May This Agreement was approved as to form and content by the City Attorney this 18th of May, 2012, and this date shall constitute the Effective Date of this Agreement.

THE CITY OF SAN DIEGO, a Municipal Corporation

Dated: 5-8-2012

By: Tony Heinrichs

Approved as to form:

JAN GOLDSMITH, City Attorney

Dated: 5/18/2012

By: Shannon Thomas

MREC – Davidson Fairbanks, LLC,
a California limited liability company

Dated: 1.5.12

By: Wh AD

10/23/11
Or. Dept. Facilities Funding

Exhibit "A"

FAIRBANKS COUNTRY VILAS

CITY OF SAN DIEGO, CALIFORNIA
VESTING TENTATIVE MAP, PRD SITE/GRADING PLAN
REZONE: RPO AND HRO

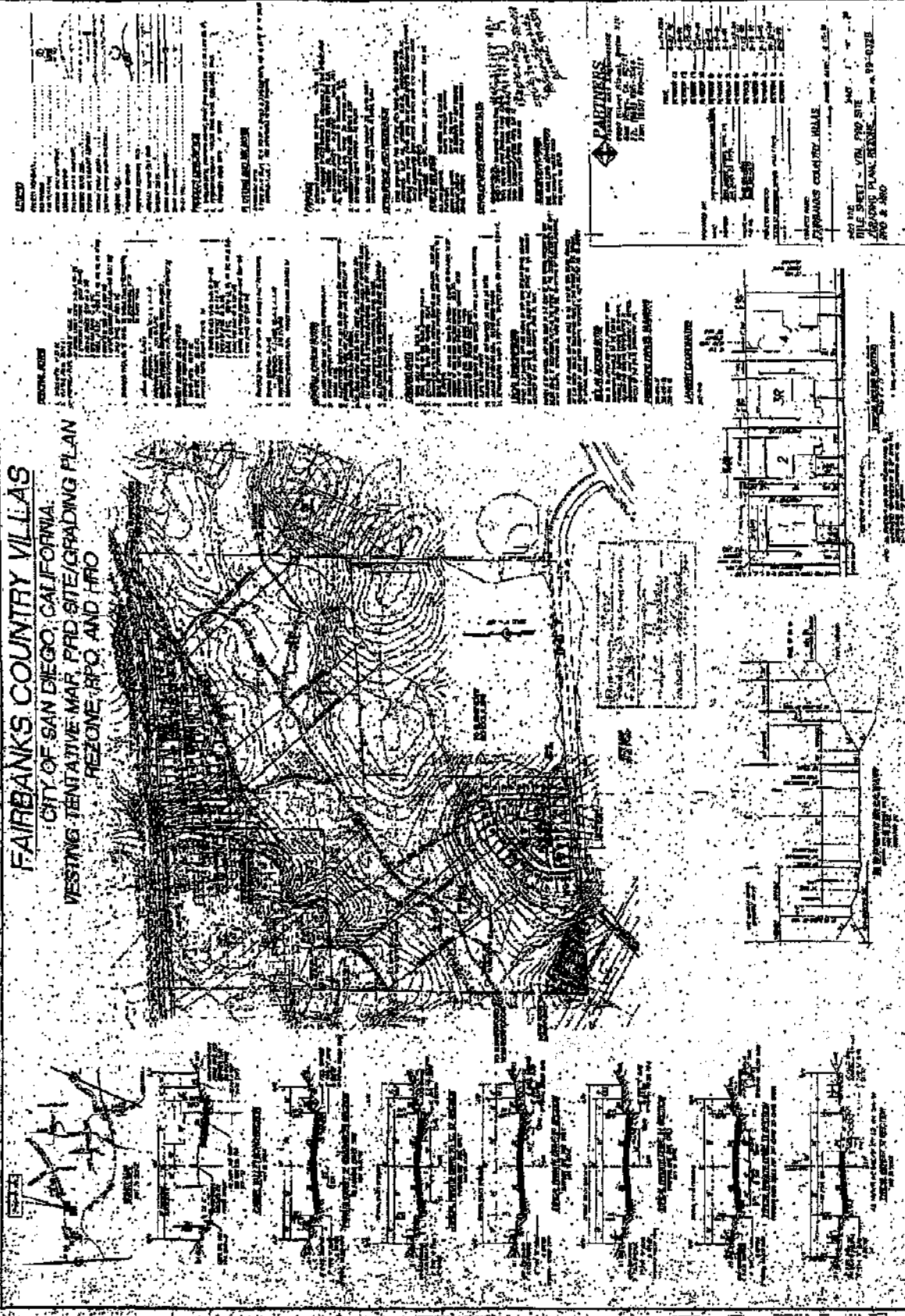
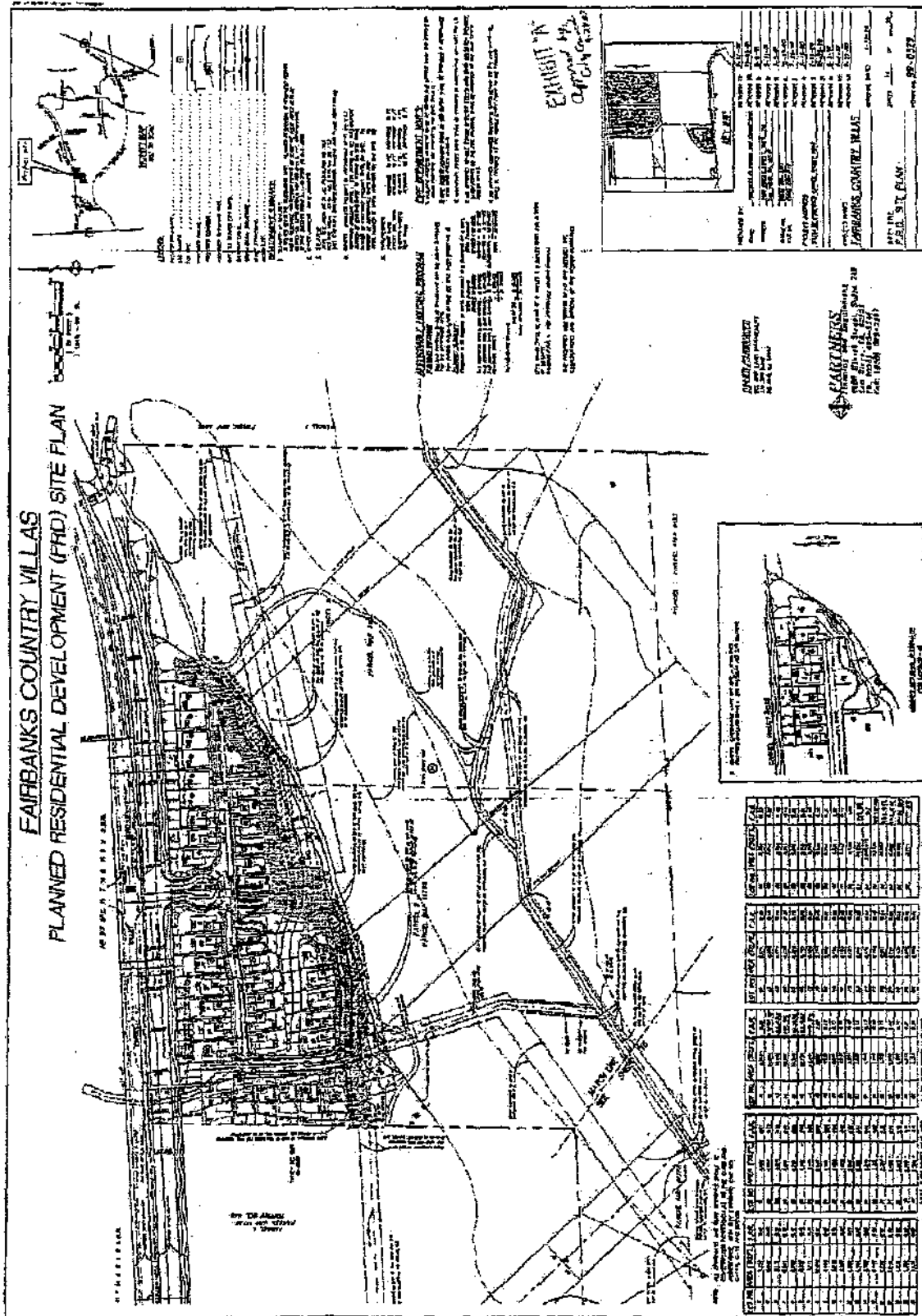


Exhibit "A"

FAIRBANKS COUNTRY VILLAS PLANNED RESIDENTIAL DEVELOPMENT (PRD) SITE PLAN



FAIRBANKS COUNTRY VILLAS
PLANNED RESIDENTIAL DEVELOPMENT (PRD)
SITE PLAN
DATE: 10/1/88
BY: [Signature]

EXHIBIT "A"
PRD SITE PLAN



NO.	DESCRIPTION	AREA (SQ. FT.)	PERCENTAGE
1	LOT 1	10,000	10.00
2	LOT 2	10,000	10.00
3	LOT 3	10,000	10.00
4	LOT 4	10,000	10.00
5	LOT 5	10,000	10.00
6	LOT 6	10,000	10.00
7	LOT 7	10,000	10.00
8	LOT 8	10,000	10.00
9	LOT 9	10,000	10.00
10	LOT 10	10,000	10.00
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94	LOT 94	10,000	10.00
95	LOT 95	10,000	10.00
96	LOT 96	10,000	10.00
97	LOT 97	10,000	10.00
98	LOT 98	10,000	10.00
99	LOT 99	10,000	10.00
100	LOT 100	10,000	10.00

FAIRBANKS COUNTRY VILLAS
PLANNED RESIDENTIAL DEVELOPMENT (PRD)
SITE PLAN
DATE: 10/1/88
BY: [Signature]

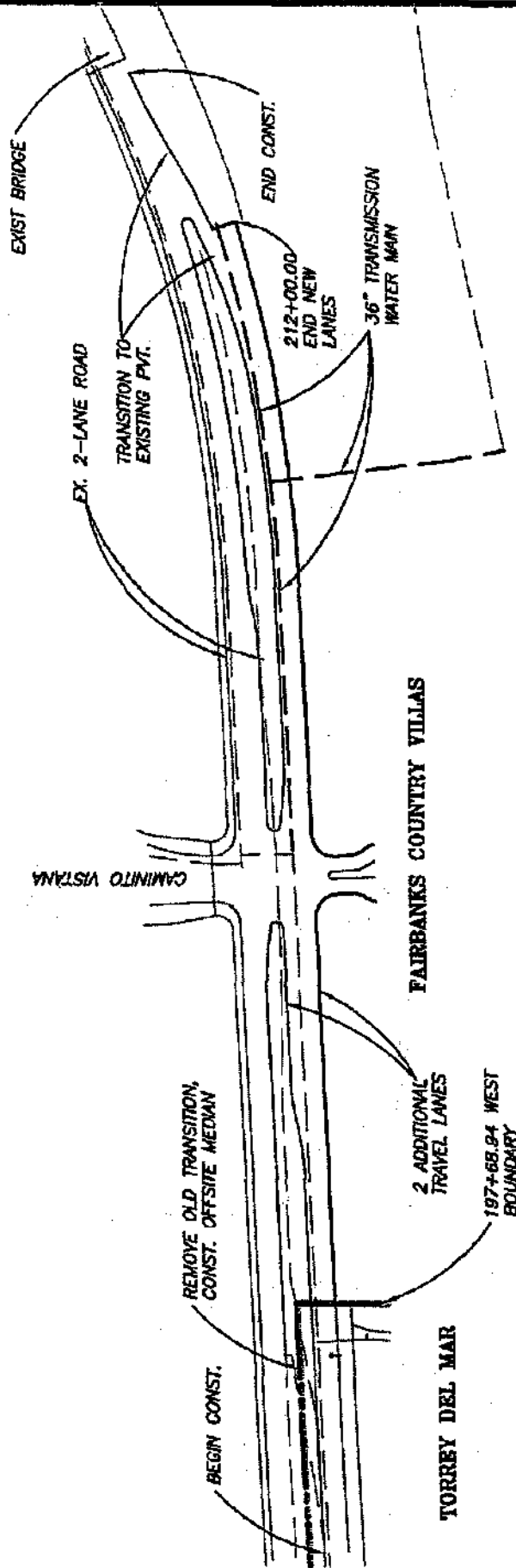
Exhibit B; Description of Project

T-4:3 Carmel Valley Road

Design and construct two additional travel lanes on the south side of Carmel Valley Road from the western property line of the Fairbanks Country Villas Development (station 197+68.94) across the frontage of the Fairbanks Country Villas development (to station 212+00.00), with median construction to the west and offsite transitions to existing paving meeting the existing bridge to the east as depicted on Exhibit C. Design and construct a new 36" transmission water main within the new road to replace the existing 30" Del Mar Heights pipeline. The scope of work will include grading, surface improvements for paving, sidewalks, medians, landscaping and irrigation for medians and parkways, street lighting, and associated utility extensions, water quality mitigation, striping, traffic signal modification at the existing intersection with Caminito Vistana as well as other improvements associated with construction of an arterial roadway. These improvements are shown in detail on City of San Diego drawing 32592-D

P-6 Torrey Highlands Trail System

Design and construct approximately 1,400 lineal feet of paved trail on the south side of Carmel Valley Road and approximately 6,300 lineal feet of UNPAVED D.G. trail within McGonicle Canyon within the Fairbanks Country Villas project. These improvements are shown in detail on City of San Diego drawing 32565-D



**HUNSAKER
& ASSOCIATES**
SAN DIEGO, INC.

PLANNING 900 Waples Street
ENGINEERING San Diego, CA 92121
SURVEYING PH: (619) 556-4300 • FAX: (619) 556-4444

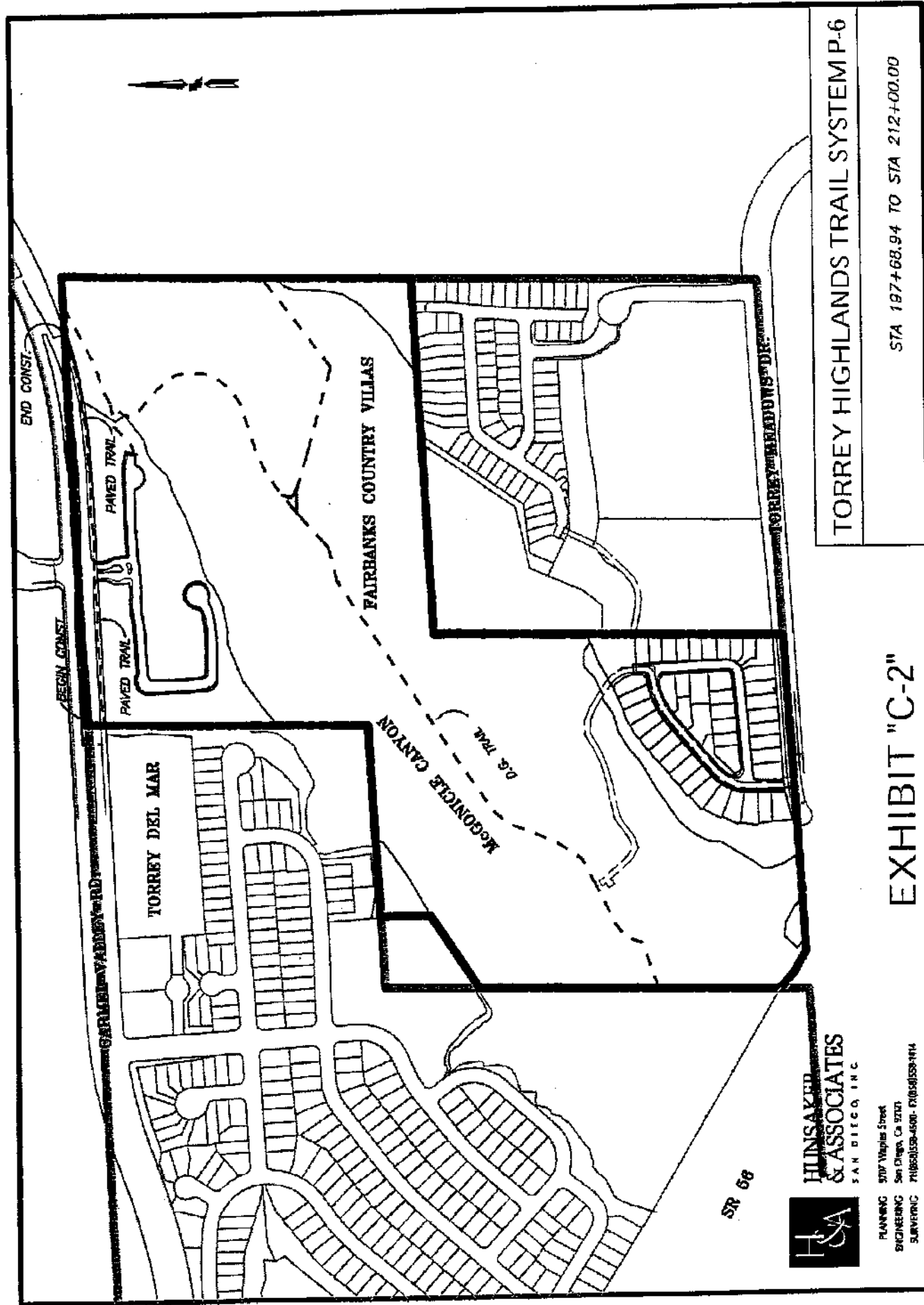
CARMEL VALLEY ROAD; T-4.3

STA 197+68.94 TO STA 212+00.00

EXHIBIT "C-1"

R:\0352\&Eng\EXHIBITS\CVR EXHIBIT C PROJECT DEPICTION.dwg

NOT TO SCALE



TORREY HIGHLANDS TRAIL SYSTEM P-6

STA 197+68.94 TO STA 212+00.00

EXHIBIT "C-2"

H&A
HILINSKA
& ASSOCIATES
SAN DIEGO, INC.

PLANNING 507 Virginia Street
ENGINEERING San Diego, Ca 92101
SURVEYING PH858/558-4600 FAX 619/558-1114

NOT TO SCALE

R:\0352\&Eng\EXHIBITS\CVR EXHIBIT C PROJECT DEPICTION.dwg

CITY OF SAN DIEGO

FACILITIES FINANCING PROGRAM

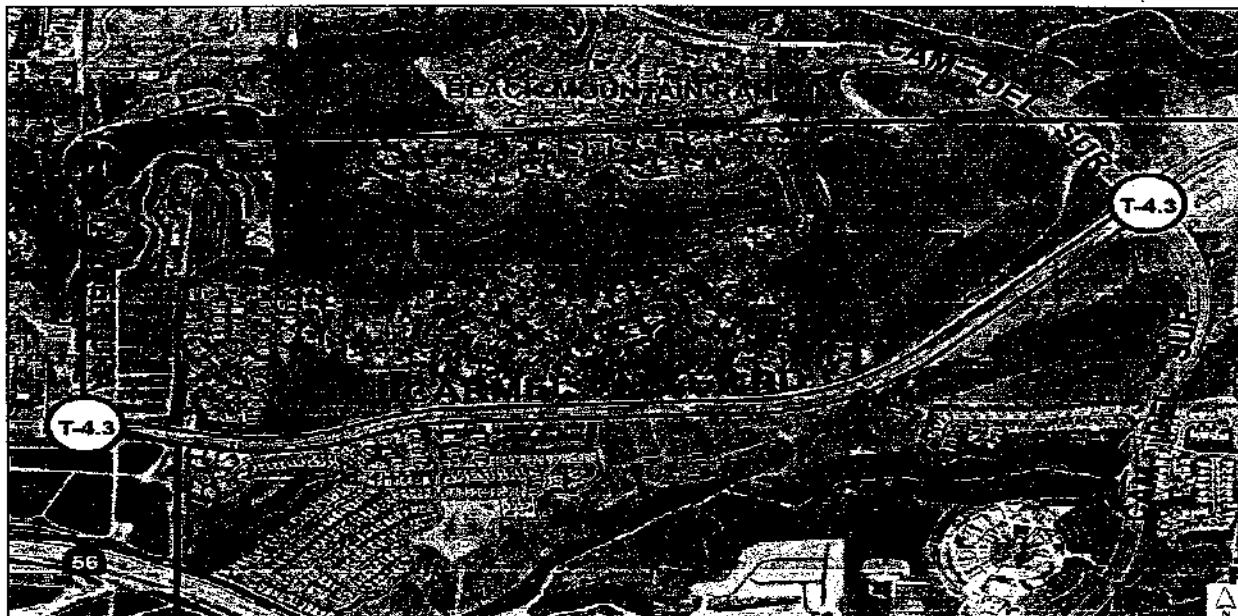
TITLE: CARMEL VALLEY ROAD (Widen to Four Lanes: Via Albertura to Camino Del Sur)

DEPARTMENT: ENGINEERING & CAPITAL PROJECTS
CIP or JO #: 52-466.0

PROJECT: T-4.3
COUNCIL DISTRICT: 1
COMMUNITY PLAN: TH

SOURCE	FUNDING	EXPENDED	CONT APPROP	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014
FBA-TH	\$10,381,450	\$2,674,667	\$0	\$0	\$7,706,783			
FBA-BMR								
FBA-PHR								
FBA-DMM								
FBA-RP								
DEV. ADV								
DEV/SUBD								
COUNTY								
STATE								
OTHER								
UNIDEN								
TOTAL	\$10,381,450	\$2,674,667	\$0	\$0	\$7,706,783	\$0	\$0	\$0

SOURCE	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
FBA-TH								
FBA-BMR								
FBA-PHR								
FBA-DMM								
FBA-RP								
DEV. ADV								
DEV/SUBD								
COUNTY								
STATE								
OTHER								
UNIDEN								
TOTAL	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0



CONTACT: LARRY VAN WEY

TELEPHONE: (619) 533-3005

EMAIL: lvw@sanidiego.gov

**CITY OF SAN DIEGO
FACILITIES FINANCING PROGRAM**

TITLE: CARMEL VALLEY ROAD (Widen to Four Lanes: Via Albertura to Camino Del Sur)

DEPARTMENT: ENGINEERING & CAPITAL PROJECTS
CIP or JO #: 52-466.0

PROJECT: T-43
COUNCIL DISTRICT: 1
COMMUNITY PLAN: TH

DESCRIPTION:

DESIGN AND CONSTRUCT TWO ADDITIONAL TRAVEL LANES IN TWO INCREMENTS. THE FIRST INCREMENT REQUIRES THE WIDENING ALONG THE FRONTAGE OF TORREY DEL MAR DEVELOPMENT. THE SECOND INCREMENT COMPLETES THE REMAINDER OF THE WIDENING. TIMING OF EACH INCREMENT OF WIDENING WILL BE BASED ON THE RATE OF DEVELOPMENT IN TORREY HIGHLANDS.

JUSTIFICATION:

THIS FACILITY IS REQUIRED TO ACCOMMODATE TRAFFIC GENERATED BY NEW DEVELOPMENT IN TORREY HIGHLANDS AND SURROUNDING COMMUNITIES.

FUNDING ISSUES:

TORREY HIGHLANDS AND BLACK MOUNTAIN RANCH ARE SHARING IN THE COST OF PROJECTS SERVING BOTH COMMUNITIES. THIS PROJECT IS AMONG THOSE TO BE FUNDED BY TORREY HIGHLANDS, WHILE OTHER PROJECTS WILL BE FUNDED BY BLACK MOUNTAIN RANCH.

NOTES:

REFERENCE: BLACK MOUNTAIN RANCH PROJECT #T-22.1.

SCHEDULE:

THE FIRST PHASE HAS BEEN COMPLETED. THE SECOND PHASE IS SCHEDULED FOR FY 2011 DEPENDING ON FUNDING AVAILABILITY.

CONTACT: LARRY VAN WEY

TELEPHONE: (619) 533-3005

EMAIL: Lvanwey@sanidiego.gov

CITY OF SAN DIEGO

FACILITIES FINANCING PROGRAM

TITLE: CARMEL VALLEY ROAD (Widen to Four Lanes: Via Albertura to Camino Del Sur)

DEPARTMENT: ENGINEERING & CAPITAL PROJECTS
CIP or JO #: 52-466.0/S-00854

PROJECT: T-4.3
COUNCIL DISTRICT: 1
COMMUNITY PLAN: TH

SOURCE	FUNDING	EXPENDED	CONT APPROP	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
FBA-TH	\$10,381,450	\$2,674,667	\$7,706,783					
FBA-BMR								
FBA-PHR								
FBA-DMM								
FBA-RP								
DEV. ADV								
DEV/SUBD								
COUNTY								
STATE								
OTHER								
UNIDEN								
TOTAL	\$10,381,450	\$2,674,667	\$7,706,783	\$0	\$0	\$0	\$0	\$0

SOURCE	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022	FY 2023
FBA-TH								
FBA-BMR								
FBA-PHR								
FBA-DMM								
FBA-RP								
DEV. ADV								
DEV/SUBD								
COUNTY								
STATE								
OTHER								
UNIDEN								
TOTAL	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0



CONTACT: DONALD PORNAN

TELEPHONE: (619) 533-3097

EMAIL: dpornan@sanidiego.gov

**CITY OF SAN DIEGO
FACILITIES FINANCING PROGRAM**

TITLE: CARMEL VALLEY ROAD (Widen to Four Lanes: Via Albertura to Camino Del Sur)

DEPARTMENT: ENGINEERING & CAPITAL PROJECTS
CIP or JO #: 52-466.0/S-00854

PROJECT: T-4.3
COUNCIL DISTRICT: 1
COMMUNITY PLAN: TH

DESCRIPTION:

DESIGN AND CONSTRUCT TWO ADDITIONAL TRAVEL LANES AND RELOCATE THE EXISTING DEL MAR HEIGHTS PIPELINE INTO THE NEW ROAD AND UPSIZE TO 36". WORK TO BE COMPLETED IN THREE INCREMENTS. THE FIRST INCREMENT REQUIRES THE WIDENING ALONG THE FRONTAGE OF TORREY DEL MAR DEVELOPMENT. THE SECOND INCREMENT REQUIRED THE WIDENING ALONG THE FRONTAGE OF FAIRBANKS COUNTRY VILLAS DEVELOPMENTS. THE THIRD COMPLETES THE REMAINDER OF THE WIDENING. TIMING OF EACH INCREMENT OF WIDENING WILL BE BASED ON THE RATE OF DEVELOPMENT IN TORREY HIGHLANDS.

JUSTIFICATION:

THE ROAD AND WATERLINE FACILITIES ARE REQUIRED TO ACCOMMODATE INCREASED USAGE GENERATED BY NEW DEVELOPMENT IN TORREY HIGHLANDS AND SURROUNDING COMMUNITIES.

FUNDING ISSUES:

TORREY HIGHLANDS AND BLACK MOUNTAIN RANCH ARE SHARING IN THE COST OF PROJECTS SERVING BOTH COMMUNITIES. THIS PROJECT IS AMONG THOSE TO BE FUNDED BY TORREY HIGHLANDS, WHILE OTHER PROJECTS WILL BE FUNDED BY BLACK MOUNTAIN RANCH. PHASE II & III OF THIS PROJECT HAS TWO ACTIVE REIMBURSEMENT AGREEMENTS WITH D.R. HORTON/WPH AND DAVIDSON COMMUNITIES ASSOCIATED WITH IT.

NOTES:

REFERENCE: BLACK MOUNTAIN RANCH PROJECT #T-22.1.

SCHEDULE:

THE FIRST PHASE HAS BEEN COMPLETED. THE SECOND PHASE WILL CONSIST OF WIDENING ALONG THE FRONTAGE OF FAIRBANKS COUNTRY VILLAS, VTM#7439, ANTICIPATED TO BE COMPLETED BY DAVIDSON DURING FY 2012. THE THIRD PHASE WILL COMPLETE THE WIDENING INCLUDING THE BRIDGE CROSSING AND IS ANTICIPATED TO BE COMPLETED BY D.R. HORTON DURING FY 2013/2014 DEPENDING ON FUNDING AVAILABILITY.

CITY OF SAN DIEGO FACILITIES FINANCING PROGRAM

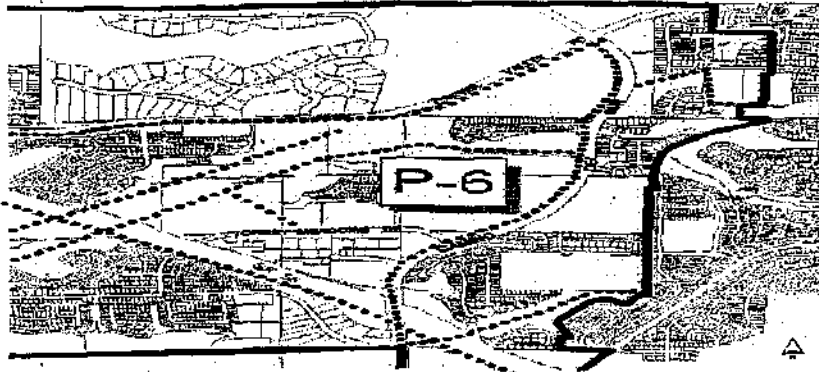
TITLE: TORREY HIGHLANDS TRAIL SYSTEM

DEPARTMENT: PARK AND RECREATION
CIP or JO #: 29-548.0

PROJECT: P-6
COUNCIL DISTRICT: 1
COMMUNITY PLAN: TH

SOURCE	FUNDING	EXPENDED	ACCT APPROP	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014
FBA-TH	\$1,070,000	\$600,722	\$198,556		\$270,722			
FBA-BMR								
FBA-PHR								
FBA-DMM								
FBA-RP								
DEV. ADV								
DEV/SUBD								
COUNTY								
STATE								
OTHER								
UNIDEN								
TOTAL	\$1,070,000	\$600,722	\$198,556	\$0	\$270,722	\$0	\$0	\$0

SOURCE	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
FBA-TH								
FBA-BMR								
FBA-PHR								
FBA-DMM								
FBA-RP								
DEV. ADV								
DEV/SUBD								
COUNTY								
STATE								
OTHER								
UNIDEN								
TOTAL	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0



CONTACT: Rick Thompson

TELEPHONE: (619) 533-6756

EMAIL: RThompson@sanidato.gov

**CITY OF SAN DIEGO
FACILITIES FINANCING PROGRAM**

TITLE: TORREY HIGHLANDS TRAIL SYSTEM

DEPARTMENT: PARK AND RECREATION
CIP or JO #: 29-548.0

PROJECT: P-6
COUNCIL DISTRICT: 1
COMMUNITY PLAN: TH

DESCRIPTION:

DESIGN AND CONSTRUCTION OF APPROXIMATELY 35,000 LINEAL FEET (6.5 MILES) OF BICYCLE, HIKING AND EQUESTRIAN TRAILS TO BE LOCATED THROUGHOUT THE COMMUNITY IN ACCORDANCE WITH THE TORREY HIGHLANDS SUBAREA PLAN. THE SYSTEM WILL CONSIST OF A NETWORK OF PAVED (8,000 L.F.) IMPROVED MULTI-USE (13,000 L.F.) AND UNPAVED (14,000 L.F.) TRAILS, TOGETHER WITH A FOOTBRIDGE IN THE BOTTOM OF MCGONIGLE CANYON.

JUSTIFICATION:

THE SYSTEM OF TRAILS HAS BEEN INCORPORATED AS A CRITICAL COMPONENT OF THE TORREY HIGHLANDS SUBAREA PLAN.

FUNDING ISSUES:

NOTES:

THE TRAILS SYSTEM WILL PROVIDE ACCESS INTO THE MULTIPLE SPECIES CONSERVATION PRESERVE AREA OF MCGONIGLE CANYON, WILL PROVIDE PATHWAYS ALONG THE CAMINO DEL SUR AND CARMEL VALLEY ROAD ALIGNMENTS, AND WILL PROVIDE ACCESS INTO THE RANCHO PEÑASQUITOS COMMUNITY.

SCHEDULE:

FUNDING HAS BEEN PHASED TO COINCIDE WITH THE ACQUISITION AND DEVELOPMENT OF THE RIGHT-OF-WAY AND OPEN SPACE PARCELS IN WHICH THE TRAILS WILL BE LOCATED. COMPLETION OF THIS PROJECT WILL BE CONCURRENT WITH DEVELOPMENT BUILD-OUT.

CONTACT: Rick Thompson

TELEPHONE: (619) 533-6756

EMAIL: RThompson@sanidiego.gov

EXHIBIT E
Project Schedule

[Attached]

EXHIBIT E

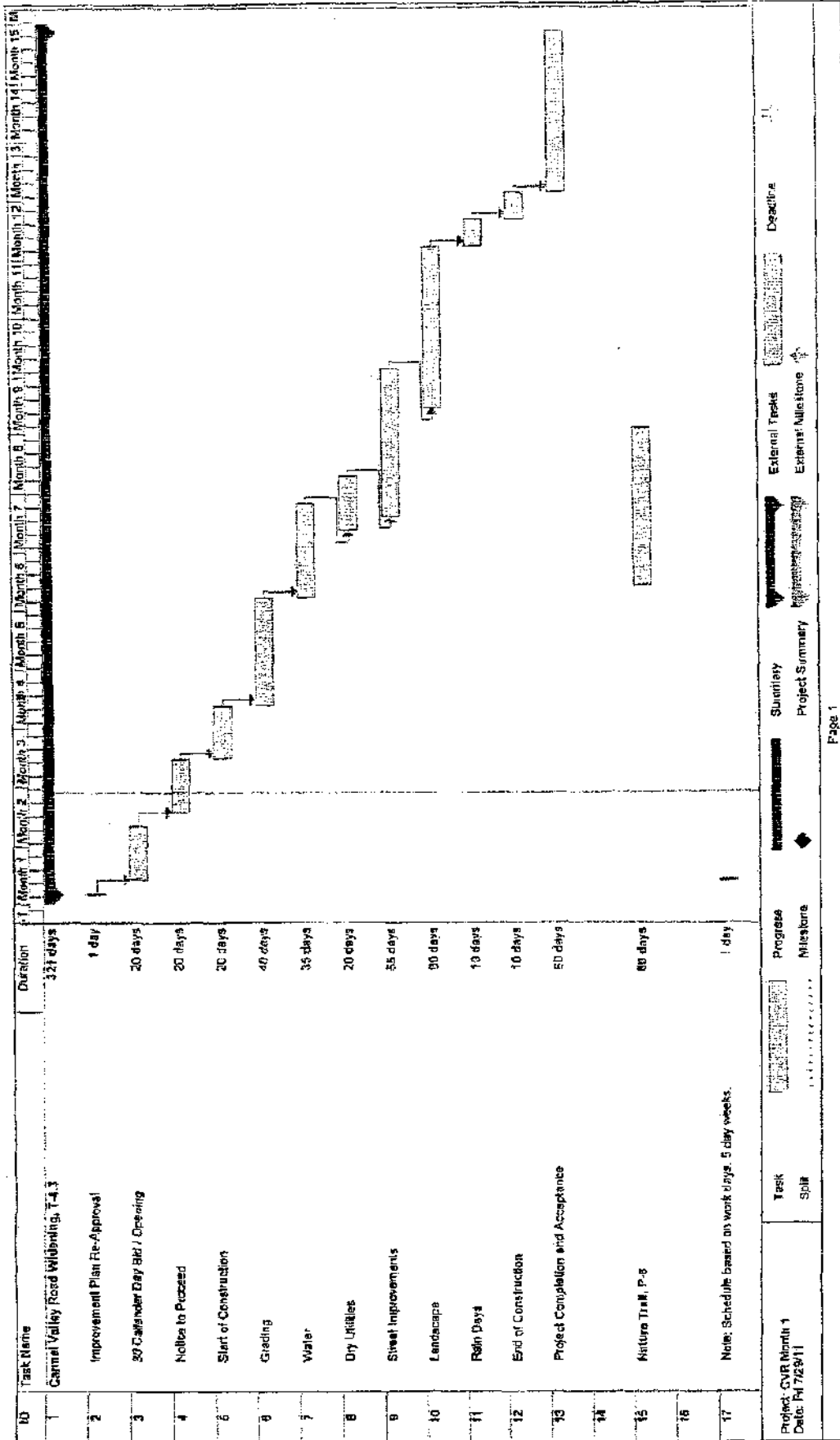


EXHIBIT F - 1

ESTIMATED COST OF PROJECT (Road Project)

(i) PROJECT COSTS

A. Previous Soft Costs (MREC-Davidson LLC via assignment from previous owner)

Engineering (Civil, Mechanical, Water System)	\$46,323
Traffic Engineer	\$28,600
Landscape Architect	\$21,199

B. Current Soft Costs (MREC-Davidson LLC)

Utility Consultant	\$1,250
Site Development Fees	\$77,358
Traffic Consultant	\$18,500
Civil Engineer	\$132,500
Landscape Architect	\$29,794
Soils Engineer	\$55,004
Repro-Blueprints	\$2,200
Biologist	\$4,000

C. Improvement Costs (MREC-Davidson LLC)

Site & Grading Improvements	\$243,743
Water System Improvements	\$488,271
Utility Improvements	\$37,282
Street Improvements	\$795,510
Landscape Improvements	\$368,996

(ii) SUBDIVIDER'S ADMINISTRATIVE COSTS

5% of Project Costs (excluding Previous Soft Costs)	\$112,720
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(iii) PROJECT CONTINGENCY

10% of Improvement Costs	<u>\$193,380</u>
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TOTAL SUBDIVIDER COST	\$2,656,630
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(iv) CITY ADMINISTRATIVE COSTS

5% of Improvement Costs	\$96,690
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TOTAL ROAD PROJECT COSTS	<u>\$2,753,320</u>
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EXHIBIT F - 2

ESTIMATED COST OF PROJECT (partial P-6)

(i) PROJECT COSTS

A. Previous Soft Costs (MREC-Davidson LLC via assignment from previous owner)

Civil Engineer	\$2,500
Landscape Architect	\$2,500

B. Current Soft Costs (MREC-Davidson LLC)

Civil Engineer	\$1,500
Soils Engineer	\$1,000

C. Improvement Costs (MREC-Davidson LLC)

Nature Trail & Meandering Sidewalk	\$237,514
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(ii) SUBDIVIDER'S ADMINISTRATIVE COSTS

5% of Project Costs	\$12,251
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(iii) PROJECT CONTINGENCY

10% of Improvement Costs	<u>\$23,751</u>
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TOTAL SUBDIVIDER COST	\$281,016
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(iv) CITY ADMINISTRATIVE COSTS

5% of Improvement Costs	\$11,876
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TOTAL PARK PROJECT COSTS	\$292,892
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EXHIBIT G

Project Schedule Obligations and Components

1. **Subdivider's Obligation.** To the extent required by City, Subdivider shall provide, coordinate, revise, and maintain the Project Schedule for all phases of the Project.
 - A. *Project Initiation.* During Project initiation and design phases, Subdivider shall submit an updated project schedule on a quarterly basis to City for approval.
 - B. *Construction Phase.* During Construction, Subdivider shall submit on a monthly basis any updates to the Project Schedule to the Resident Engineer with a copy to City's Facilities Financing Department. The updated schedule shall include:
 - i. Forecast Data with the intended plan for the remainder of the contract duration.
 - ii. Actual Data with indications of when and how much Work and/or Services was performed (% complete)
 - iii. Logic changes or other changes required to maintain the Project Schedule
2. **Detail and Format.** Unless otherwise directed by City, the Project Schedule shall include all phases of the Project. It shall be in a precedence diagram format, plotted on a time-scaled calendar, detailed to activity level, and shall include:
 - A. *Identification of design and construction activities and their sequence:*
 - i. Work shall be divided into a minimum of 5 activities.
 - ii. Activities shall not exceed 21 calendar days in duration or \$50,000 in value, except long lead procurement and submittal activities or those accepted by City.
 - iii. Each Activity shall be assigned a budget value in accordance with Agreement requirements and activity descriptions.
 - a. The sum of all budget values assigned shall equal Estimated Cost.
 - b. Each construction activity shall indicate the estimated labor days and materials quantities required.
 - iv. Incorporate specific activity and time requirements.
 - v. Include 10 weather/delay days, commonly known as "rain days." The late finish date shall be the fully elapsed Contract Time.

- B. *Float Time.* Show activities on their early dates with corresponding Total Float Time noted beside them.
 - i. Project Schedule shall not include more than 40 calendar days of Float Time absent City approval.
 - C. *Milestones.* Show Milestones with beginning and ending dates.
 - i. Milestones shall include schematic plans, 60% design, 90% design, 100% design; bid opening; Notice to Proceed; start construction; end construction; and Project Completion and Acceptance.
 - D. *Relationships.* Show all appropriate definable relationships with separate explanation of constraints and each start-start, finish-finish, or lag relationship. Relate all activities to each other and to the first appropriate Milestone.
 - E. *Procurement.* Show the procurement of major equipment and materials.
 - F. *Submittals.* Include all submittals required and identify the planned submittal dates, adequate review time, and the dates acceptance is required to support design and construction.
3. **Submittal.** Project Schedule shall be submitted to City on a computer disk in PRIMAVERA Project Planner P3e/c Release Version 4.1 SP1 software in conformance with Construction Plans & Scheduling by AGC of America, or other software specifically designated by City.

EXHIBIT H

Meeting Requirements

1. **Preconstruction Meeting.** Subdivider shall conduct a preconstruction meeting with its agents and employees and City. The purpose of this meeting is to discuss: (1) the Agreement conditions, (2) Scope of Work clarifications, and (3) City policies, inspection requirements, and procedures.
 - A. *Attendance.* Subdivider shall ensure the preconstruction meeting is attended by Subdivider's construction contractor, the Project Superintendent, all Subdivider's major subcontractors, a representative of City's Facilities Financing Department, the City Inspection Team as set forth in the Agreement, and all other persons necessary as determined by Subdivider or City.
 - B. *Minutes.* Subdivider shall take corresponding meeting minutes and distribute copies to all attendees.
2. **Progress Meetings.** Subdivider shall conduct regular progress meetings at dates and times scheduled at the preconstruction meeting with the following necessary parties: Subdivider's Construction Superintendent, Subdivider's Project Manager, Subdivider's Design Consultant (on an as needed basis only), City representatives including Responsible Department representatives, Engineering and Capital Projects Project Manager and Resident Engineer.
 - A. *As-Builts.* Subdivider shall bring updated As-Builts and verify that the latest changes have been made.
 - B. *Special Meetings.* Special meetings shall occur at Project phases as outlined in Exhibit I.
 - C. *Rescheduling.* Progress and Special Meetings may be rescheduled if rescheduled meeting times are convenient for all necessary parties, and Subdivider has given no less than seven calendar days prior written notice of the rescheduled meeting.
3. **Agenda.** All meetings shall include at a minimum the agenda identified in Exhibit I.

EXHIBIT I

Preconstruction, Progress, & Special Meeting Agenda

1. Preconstruction. The issues below should be made part of the Preconstruction Meeting Agenda; however, the agenda may deviate depending on needs.
 - 1.1 Permits and Utility Issues. telephone, cable, gas and electric. RE to announce to Subdivider that franchise companies may be working in the area of the Project and that coordination regarding such a situation may need to be done.
 - 1.2 Parking areas establish for construction employees and possibly patrons/others.
 - 1.3 Subdivider's payment procedure and forms.
 - 1.4 Format for Request for Proposals (RFPs) using the sample in the back of the contract documents.
 - 1.5 Collection of emergency numbers for off-hour emergencies from the prime (with an alternate contact person).
 - 1.6 Distribution and discussion of the construction schedule.
 - 1.7 Procedure for maintaining Project record documents.
 - 1.8 Distribution of the Second Opinion Option Form.
 - 1.9 Designation of persons authorized to represent and sign documents for the RE and Subdivider and the respective communication procedures between Parties.
 - 1.10 Safety and first aid procedures including designation of Subdivider's safety officer.
 - 1.11 Temporary barricades, fencing, signs, and entrance and exit designations, etc.
 - 1.12 Testing laboratory or agency and testing procedures.
 - 1.13 Establish schedule for progress meetings.
 - 1.14 Procedure for changes in work requested by Subdivider, notice to RE, timing, etc.
 - 1.15 Procedure for changes in work requested by City.
 - 1.16 Public safety.
 - 1.17 Housekeeping procedures, Project site maintenance.

- 1.18 Protection and restoration of existing improvements.
- 1.19 Sanitation, temporary lighting, power, water, etc.
- 1.20 Procedure for encountering hazardous substances.
- 1.21 Any items requested by attendees of preconstruction meeting/open discussion.
- 2. Progress Meetings. The issues below should be made part of the Progress Meeting Agenda; however, the agenda may deviate depending on needs.
 - 2.1 Review progress of construction since the previous meeting.
 - 2.2 Discuss field observations, problems, conflicts, opportunities, etc.
 - 2.3 Discuss pre- planning opportunities.
 - 2.4 Identify problems that impede planned progress and develop corrective measures as required to regain the projected schedule. Revise the schedule if necessary.
 - 2.5 Discuss Subdivider's plan for progress during the next construction period and the corresponding inspections necessary.
 - 2.6 Discuss submittal status.
 - 2.7 Discuss request for information (RFI) status.
 - 2.8 Progress of schedule.
 - 2.9 Disputed items.
 - 2.10 Non-conformance/non-compliance items.
 - 2.11 New business of importance from any member of the meeting.
 - 2.12 Deferred approvals and their coordination.
 - 2.13 Discuss request for proposals, change orders, and progress payment status.
- 3. Special Meetings. To the extent applicable to the Project, the following special meeting shall be held:
 - 3.1 Grading. Prior to grading the site, a **grading mini-preconstruction** meeting will be called for by the RE. This meeting applies when surveying is being supplied by the City. The superintendent, the Subdivider's appropriate subcontractors, the RE, the City's survey crew, and any appropriate consultants (if deemed necessary by the RE) will attend. Unless otherwise noted, the agenda will be to coordinate the staking, reference markers, bearings, various site conditions, etc. as defined in the

contract documents and any necessary coordination of scope or scheduling between the respective Parties.

- 3.2 Roofing. Upon completion of the roofing structural diaphragm and prior to installing flashing, and/or any other roofing materials, the RE shall call a **roof mini-preconstruction** meeting. The superintendent, the Subdivider's appropriate contractors, the RE, any City representative deemed appropriate by the RE, the roof suppliers manufacturer's representative, and any appropriate consultants (if deemed necessary by the RE) will attend. The agenda will be to coordinate the flashing, caulking, sealing, and different roofing materials and/or contractors on site with the various field conditions.
- 3.3 Landscaping. Upon completion of the grading and prior to the installation of any landscaping equipment, supplies, etc., the RE shall call a **landscaping mini-preconstruction** meeting. The superintendent, the Subdivider's appropriate contractors, the RE, any City representative deemed appropriate by the RE, and any appropriate consultants (if deemed necessary by the RE) will attend. The agenda will be to coordinate all landscape materials, plant and irrigation coverage, visual planting procedures, etc. and/or contractors on site with the various field conditions.
- 3.4 Mini-Preconstruction Meeting. Prior to the installation of any mechanical, electrical, plumbing, and sprinkler system equipment, the Subdivider shall call a **mini-preconstruction** meeting. The superintendent, the Subdivider's appropriate contractors, the RE, any City representative deemed appropriate by the RE, and any appropriate consultants (if deemed necessary by the RE) will attend. The intent of this meeting is to ensure that the prime contractor is adequately coordinating the space of the facility so as to not impede the visual integrity of the overall product.
- 3.5 Other. Upon appropriate notice to other parties, special meetings may be called by the RE at times agreed to by all parties involved.

EXHIBIT J

Procedure for Processing Change Orders

1. **Forms Required.** All Change Orders shall be in writing on the appropriate City form and must be approved or rejected by City in writing as provided in Section 3, below, and delivered to Subdivider.
1. **Written Approval of Change Orders.** Change Orders that will not result in an increase in the Estimated Cost may be approved by the RE. If a requested Change Order would result in an increase in the Estimated Cost, approval of the Change Order shall require City Council approval.
2. **Process for Approval of Change Orders.** Subdivider shall notify the RE in writing of the need for a Change Order. Change Order must indicate whether the change will affect, in any way, by increasing or decreasing, the Estimated Cost, Project Schedule, or Project quality established during the design and submittal review process.
 - 2.1 *Resident Engineer Approval.* If the Change Order request does not result in an increase in the Estimated Cost, the RE shall either approve or reject the Change Order in writing within fourteen (14) calendar days of receiving Subdivider's written notice, provided Subdivider has submitted complete documentation substantiating the need for such Change Order. If City fails to respond to Subdivider's written notice within the fourteen (14) calendar days, the Change Order request shall automatically be deemed denied.
 - 2.2 *City Council Approval.* For Change Orders not subject to Section 3.1, above, City Council approval is required. Once a change order has been preliminarily approved by appropriate City staff, the appropriate City staff shall process the Change Order along with any required amendments to the Financing Plan and this Agreement as a 1472, a Request for Council Action. At a hearing on such Request for Council Action, City Council may either approve or reject such Change Orders. Council Approval shall not be subject to the fourteen (14) calendar day response time set forth above in Section 3.1. Furthermore, nothing in this Agreement shall compel City Council to take any particular action.
3. **City Council Review of a Request to Increase the Estimated Cost.** The Estimated Cost may only be increased if Subdivider provides documentation showing the increase is reasonable in nature and amount, and is due to causes beyond Subdivider's control or otherwise not the result of unreasonable conduct by Subdivider which may, based on actual impact on Project and by way of non-exclusive examples only, include: war; changes in law or government regulation; later commonly accepted or adopted higher standards and specifications of construction; labor disputes or strikes; fires; floods; adverse weather or other similar condition of the elements necessitating temporary cessation of Subdivider's work; concealed conditions encountered in the completion of the Project; inability to reasonably obtain materials, equipment, labor, or additional

required services; inflation; actual bids received for Project Costs being greater than estimated; or other specific reasons mutually agreed to in writing by City and Subdivider. Subdivider shall not be reimbursed, and no Change Order may be approved, for costs or expenses resulting from a design error or omission (unless such a design error or omission is the direct result of a City request for such design or omission), or Subdivider's or Subdivider's agents' negligence.

EXHIBIT K

Equal Benefits Ordinance Certification of Compliance

[Attached]

EQUAL BENEFITS ORDINANCE CERTIFICATION OF COMPLIANCE



For additional information, contact:

CITY OF SAN DIEGO
EQUAL BENEFITS PROGRAM

202 C Street, MS 9A, San Diego, CA 92101
Phone (619) 533-3948 Fax (619) 533-3220

COMPANY INFORMATION

Company Name:	Contact Name:
Company Address:	Contact Phone:
	Contact Email:

CONTRACT INFORMATION

Contract Title:	Start Date:
Contract Number (if no number, state location):	End Date:

SUMMARY OF EQUAL BENEFITS ORDINANCE REQUIREMENTS

The Equal Benefits Ordinance (EBO) requires the City to enter into contracts only with contractors who certify they will provide and maintain equal benefits as defined in SDMC §22.4302 for the duration of the contract. To maintain equal benefits a contractor shall:

- Offer equal benefits to employees with spouses and employees with domestic partners in accordance with the EBO.
 - Benefits include health, dental, vision insurance; pension/401(k) plans; bereavement, family, parental leave; discounts, child care; travel/relocation; employee assistance programs; credit union; or any other benefit.
 - If a contractor does not offer a benefit to an employee with a spouse, that same benefit is not required to be offered to an employee with a domestic partner.
- Post notice of firm's equal benefits policy in the workplace and notify employees at time of hire and during open enrollment periods.
- Allow City access to records, when requested, to confirm compliance with EBO requirements.
- Submit *EBO Certification of Compliance*, signed under penalty of perjury, prior to award of contract.

This summary is provided for convenience. Full text of the EBO and Rules Implementing the EBO are available at www.sandiego.gov.

CONTRACTOR EQUAL BENEFITS ORDINANCE CERTIFICATION

Please indicate your firm's compliance status with the EBO by selecting A, B, or C below. The City may request supporting documentation.

- A. ☐ I affirm **compliance** with the EBO because my firm (*contractor must select one reason*):
- ☐ Provides identical benefits to spouses and domestic partners.
 - ☐ Provides no benefits to spouses or domestic partners.
 - ☐ Has no employees.
- B. ☐ I am not now in compliance, but request approval of **provisional compliance** with the EBO (*contractor must select one*):
- ☐ Until my firm completes administrative steps to implement compliance (3 month maximum).
 - ☐ Until effective date of my firm's first open enrollment period (1 year maximum).
 - ☐ Until expiration of current collective bargaining agreement(s) with my firm.
- C. ☐ I request approval to pay affected employees a **cash equivalent** in lieu of equal benefits and verify my firm (*contractor must select all*):
- ☐ Made reasonable efforts to comply, but will not be able to comply with EBO requirements before contract completion.
 - ☐ Will amend policies to extend benefits for which a cash equivalent is not available to domestic partners.
 - ☐ Will notify employees of the availability of a cash equivalent in lieu of equal benefits.

Under penalty of perjury under laws of the State of California, I certify I understand and will comply with requirements of the Equal Benefits Ordinance in the manner affirmed above in accordance with San Diego Municipal Code, Chapter 2, Article 2, Division 43 and the Rules Implementing the Equal Benefits Ordinance.

Name/Title of Signatory

Signature

Date

FOR OFFICIAL CITY USE ONLY

Receipt Date:	EBO Analyst:	<input type="checkbox"/> Approved	<input type="checkbox"/> Not Approved – Reason:
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EXHIBIT L

Consultant Provisions

1. **Third Party Beneficiary.** The City of San Diego is an intended third party beneficiary of this contract. In addition, it is expected that upon completion of design and payment in full to Consultant by Subdivider, the City will become the owner of the Project design and work products, and City shall be entitled to enforce all of the provisions of this contract as if it were a party hereto. Except as expressly stated herein, there are no other intended third party beneficiaries of this contract.
2. **Competitive Bidding.** Consultant shall ensure that all design plans and specifications prepared, required, or recommended under this Agreement allow for competitive bidding. Consultant shall design such plans or specifications so that procurement of services, labor or materials are not available from only one source, and shall not design plans and specifications around a single or specific product, piece of major equipment or machinery, a specific patented design, or a proprietary process, unless required by principles of sound engineering practice and supported by a written justification that has been approved in writing by the City of San Diego. Consultant shall submit this written justification to the City of San Diego prior to beginning work on such plans or specifications. Whenever Consultant recommends a specific product or equipment for competitive procurement, such recommendation shall include at least two brand names of products that are capable of meeting the functional requirements applicable to the Project.
3. **Professional Services Indemnification.** Other than in the performance of design professional services which shall be solely as addressed in Sections 4 and 5 below, to the fullest extent permitted by law, Consultant shall defend (with legal counsel reasonably acceptable to the City), indemnify and hold harmless the City and its officers, agents, departments, officials, and employees [Indemnified Parties] from and against all claims, losses, costs, damages, injuries (including, without limitation, injury to or death of an employee of Consultant or its subcontractors, agents, subagents and consultants), expense and liability of every kind, nature and description (including, without limitation, incidental and consequential damages, court costs, attorney's fees, litigation expenses and fees of expert consultants or expert witnesses incurred in connection therewith and costs of investigation) that arise out of, pertain to, or relate to, directly or indirectly, in whole or in part, any services performed under this Agreement by Consultant, any subcontractor, anyone directly or indirectly employed by them, or anyone they control. Consultant's duty to defend, indemnify, protect and hold harmless shall not include any claims or liabilities arising from the active negligence, sole negligence or willful misconduct of the Indemnified Parties. As to Consultant's professional obligations, work or services involving this Project, Consultant agrees to indemnify and hold harmless the City of San Diego, and its agents, officers and employees from and against any and all liability, claims, costs, and damages, including but not limited to, attorney's fees, losses or payments for injury to any person or property, caused directly or indirectly from the negligent acts, errors or omissions of Consultant or Consultant's employees, agents or

officers. This indemnity obligation shall apply for the entire time that any third party can make a claim against, or sue the City of San Diego for liabilities arising out of Consultant's provision of services under this Agreement.

4. **Indemnification for Design Professional Services.** To the fullest extent permitted by law (including, without limitation, California Civil Code section 2782.8), with respect to the performance of design professional services, Design Professional shall indemnify and hold harmless the City, its officers, and/or employees, from all claims, demands or liability that arise out of, pertain to or relate to the negligence, recklessness, or willful misconduct of Design Professional or Design Professional's officers or employees.
5. **Design Professional Services Defense.** Parties will work in good faith to procure applicable insurance coverage for the cost of any defense arising from all claims, demands or liability that arise out of, pertain to or relate to the negligence, recklessness, or willful misconduct of Design Professional or Design Professional's officers or employees.
6. **Enforcement Costs.** Consultant agrees to pay any and all reasonable costs the City of San Diego may incur to enforce the indemnity and defense provisions set forth in this Agreement.
7. **Professional Liability Insurance.** For all of Consultant's employees who are subject to this Agreement, Consultant shall keep in full force and effect, errors and omissions insurance providing coverage for professional liability with a combined single limit of one million dollars (\$1,000,000) per claim and two million dollars (\$2,000,000) aggregate. Consultant shall ensure both that (1) this policy's retroactive date is on or before the date of commencement of the work to be performed under this Agreement; and (2) this policy has a reporting period of three (3) years after the date of completion or termination of this Agreement. Consultant agrees that for the time period defined above, there will be no changes or endorsements to the policy that increases the City of San Diego's exposure to loss.
8. **Commercial General Liability [CGL] Insurance.** Consultant shall keep in full force and effect, during any and all work performed in accordance with this Agreement, all applicable CGL insurance to cover personal injury, bodily injury and property damage, providing coverage to a combined single limit of one million dollars (\$1,000,000) per occurrence, subject to an annual aggregate of two million dollars (\$2,000,000) for general liability, completed operations, and personal injury other than bodily injury. Contractual liability shall include coverage of tort liability of another party to pay for bodily injury or property damage to a third person or organization. Contractual liability limitation endorsement is not acceptable.
9. **Insurance Policy Requirements.** Except for professional liability insurance and Workers Compensation, the City of San Diego and its respective elected officials, officers, employees, agents, and representatives shall be named as additional insureds. Additional insured status must be reflected on additional insured endorsement form CG 20 10, or equivalent, which shall be submitted to the City of San Diego. Further, all

insurance required by express provision of this agreement shall be carried only by responsible insurance companies that have been given at least an "A" or "A-" and "VII" rating by AM BEST, that are licensed to do business in the State of California, and that have been approved by the City of San Diego. The policies cannot be canceled, non-renewed, or materially changed except after thirty (30) calendar days prior written notice by Consultant or Consultant's insurer to the City of San Diego by certified mail, as reflected on an endorsement that shall be submitted to the City of San Diego, except for non-payment of premium, in which case ten (10) calendar days notice must be provided. Before performing any work in accordance with this Agreement, Consultant shall provide the City of San Diego with all Certificates of Insurance accompanied with all endorsements.

10. **Workers Compensation.** For all of the Consultant's employees who are subject to this Agreement and to the extent required by the State of California, the Consultant shall keep in full force and effect, a Workers Compensation policy. That policy shall provide a minimum of one million dollars (\$1,000,000) of employers liability coverage, and the Consultant shall provide an endorsement that the insurer waives the right of subrogation against the City of San Diego and its respective elected officials, officers, employees, agents and representatives.
11. **Compliance Provision.** Consultant agrees, at its sole cost and expense, to perform all design, contract administration, and other services in accordance with all applicable laws, regulations, and codes, including, but not limited to, the Americans with Disabilities Act of 1990 [ADA] and title 24 of the California Code of Regulations as defined in Section 18910 of the California Health and Safety Code [Title 24]. Further, Consultant is responsible as designer and employer to comply with all parts of the ADA and Title 24.
12. **Maintenance of Records.** Consultant shall maintain books, records, logs, documents and other evidence sufficient to record all actions taken with respect to the rendering of services for the Project, throughout the performance of the services and for a period of five (5) years following completion of the services for the Project. Consultant further agrees to allow the City of San Diego to inspect, copy and audit such books, records, documents and other evidence upon reasonable written notice. In addition, Consultant agrees to provide the City of San Diego with complete copies of final Project design and construction plans and Project cost estimate.

EXHIBIT M

Design and Construction Standards

1. **Laws.** All local, City, County, State, and Federal laws, codes and regulations, ordinances, and policies, including to the extent applicable but not limited to, Development Services Department permits, hazardous material permits, site safety, state and local Building Codes, stormwater regulations, etc.
 - A. *The Americans with Disabilities Act [ADA] and Title 24 of the California Building Code.* It is the sole responsibility of Subdivider to comply with all ADA and Title 24 regulations.
 - B. *Environmental.* Subdivider shall complete all environmental measures required by CEQA (State requirements), NEPA (Federal requirements), and the local jurisdiction, including but not limited to, mitigation measures, and site monitoring.
 - C. *Air, Water, and Discharge.* Subdivider shall comply with the Clean Air Act of 1970, the Clean Water Act (33 USC 1368) Executive Order 11738, and the Stormwater Management and Discharge Control Ordinance No. 0 17988.
 - D. *ESBSSA.* Subdivider shall comply with the Essential Services Building Seismic Safety Act, SB 239 & 132.
 - E. *City Directives.* Subdivider shall comply immediately with all directives issued by City or its authorized representatives under authority of any laws, statutes, ordinances, rules, or regulations.
2. **Standard Specifications.** Subdivider shall comply with the most current editions of the following reference specifications when designing and constructing the Project [Specifications], including:
 - A. *Greenbook.* Standard Specifications for Public Works Construction, including the Regional and City of San Diego Supplement Amendments.
 - B. *DOT.* California Department of Transportation Manual of Traffic Controls for Construction and Maintenance Work Zones.
3. **City Standards.** Subdivider's professional services shall be provided in conformance with the professional standards of practice established by City. This includes all amendments and revisions of these standards as adopted by City. The professional standards of practice established by City include, but are not limited to, the following:
 - A. *City of San Diego's Drainage Design Manual.*

- B. *City of San Diego's Landscape Technical Manual produced by the Planning Department.*
- C. *City of San Diego's Street Design Manual.*
- D. *City of San Diego's Manual of Preparation of Land Development and Public Improvement Plans.*
- E. *City of San Diego's Technical Guidelines for Geotechnical Reports.*
- F. *City of San Diego Standard Drawings including all Regional Standard Drawings.*
- G. *City of San Diego Data Standards for Improvement Plans.*
- H. *The City of San Diego Consultant's Guide to Park Design and Development.*
- I. *The City of San Diego Water Department Guidelines and Standards*

EXHIBIT N

Certification for Title 24/ADA Compliance

PROJECT NO. T.4-3, CARMEL VALLEY ROAD WIDENING: VIA ALBERTURA
TO CAMINO DEL SUR)

I HEREBY WARRANT AND CERTIFY that any and all plans and specifications prepared for the Project (Project No. T.4-3, Carmel Valley Road Widening: Via Albertura to Camino del Sur) by RAY MARTIN [*Insert name of Consultant/Sub] that requires a building permit from the City shall meet all current California Building Standards Code, California Code of Regulations, Title 24 and Americans with Disabilities Act Accessibility Guidelines requirements, and shall be in compliance with the Americans with Disabilities Act of 1990.

Dated: 3-29-12

By: [Signature]
Authorized Representative

MICHAEL LEVESQUE
Print Name and Title

EXHIBIT O

Approval of Design, Plans, and Specifications

Subdivider has obtained the required City permits and approvals for the Project including, without limitation, the Project improvements shown on the following:

1. Approval #4 88256 Signed by City on February 22, 2004
2. Approval #2 30487 Signed by City on July 14, 2011
3. Approval #4 25379 Signed by City on Sept. 29, 2011

101718902.1

EXHIBIT P

Construction Obligations

1. **Site Safety, Security, and Compliance.** Subdivider shall be responsible for site safety, security, and compliance with all related laws and regulations.
 - A. *Persons.* Subdivider shall be fully responsible for the safety and security of its officers, agents, and employees, City's officers, agents, and employees, and third parties authorized by Subdivider to access the Project site.
 - B. *Other.* Subdivider is responsible for the Project, site, materials, equipment, and all other incidentals until the Project has been Accepted by the City pursuant to Article I.
 - C. *Environment.* Subdivider shall be responsible for the environmental consequences of the Project construction and shall comply with all related laws and regulations, including the Clean Air Act of 1970, the Clean Water Act, Executive Order number 11738, and the Stormwater Management and Discharge Control Ordinance No. 0-17988, and any and all Best Management Practice guidelines and pollution elimination requirements as may be established by the Enforcement Official. Furthermore, the Subdivider shall prepare and incorporate into the Construction Documents a Stormwater Pollution Prevention Plan [SWPPP] to be implemented by the Subdivider during Project construction. Where applicable, the SWPPP shall comply with both the California Regional Water Quality Control Board Statewide General Construction Storm Water permit and National Pollution Discharge Elimination System permit requirements and any municipal regulations adopted pursuant to the permits.
2. **Access to Project Site.**
 - A. *Field Office.* Subdivider shall provide in the construction budget a City field office (approximately 100 square feet) that allows City access to a desk, chair, two drawer locking file cabinet with key, phone, fax, computer, copy machine and paper during working hours.
 - B. *Site Access.* City officers, agents and employees have the right to enter the Project site at any time; however, City will endeavor to coordinate any entry with Subdivider.
 - C. *Site Tours.* Site tours may be necessary throughout completion of the Project. Subdivider shall allow City to conduct site tours from time to time as the City deems necessary. City will give Subdivider notice of a prospective tour and a mutually agreeable time shall be set. Subdivider is not obligated to conduct tours or allow access for tours when City failed to give prior notice.

3. **Surveying and Testing.** Subdivider shall coordinate, perform, and complete all surveying, materials testing, and special testing for the Project at the Project site, as otherwise required by this Agreement, and as required under the State Building Code or any other law or regulation, including:
- A. *Existing Conditions.* Subdivider shall obtain all necessary soils investigation and conduct agronomic testing required for design of the Project. The Soils Consultant shall prepare a statement that will be included in the Bidding Documents as to the nature of soils, ground water conditions and any other information concerning the existing conditions of the site.
 - B. *Utilities.* Subdivider shall provide all required information for the construction or relocation of Public or private utility facilities that must be constructed or relocated as a result of this Project. Subdivider shall file all of the required documents for the approval of authorities having jurisdiction over the Project and in obtaining the services of all utilities required by the Project.
 - C. *Geotechnical Information.* Subdivider shall obtain all necessary geotechnical information required for the design and construction of the Project. The Project Engineering Geologist and/or Project Soils Engineer (qualified R.C.E. or R.G.E.) shall prepare a statement, that will be included in the Bidding Documents, to address existing geotechnical conditions of the site that might affect construction.
4. **Public Right of Way.** All work, including, materials testing, special testing, and surveying to be conducted in the Public right of way shall be coordinated with the City.
- A. *Materials Testing.* Subdivider shall pay for and coordinate with City to have all material tests within the Public right of way and any asphalt paving completed by City's Material Testing Laboratory.
 - B. *Surveying.* Subdivider shall pay for and coordinate with City's Survey Section all surveying required within the Public right of way.
 - C. *Follow all Laws, Rules, and Regulations.* Subdivider agrees to follow all City standards and regulations while working in the Public right of way, including but not limited to, utilizing proper traffic control and obtaining necessary permits.
5. **Traffic Control.** Subdivider shall address all traffic control requirements for the Project including, if necessary, separate traffic control plans and/or notes.
6. **Inspections.** Subdivider shall coordinate any and all special inspections required for compliance with all State Building Codes as specified in the Contract Documents.
- A. *Reports.* Subdivider shall provide the Resident Engineer all special inspection reports within seven (7) calendar days of inspection. Subdivider shall report all failures of special inspections to the Resident Engineer.

- B. *Remedies.* Remedies for compliance shall be approved by Subdivider, Subdivider's consultants, City's Development Services Department, and City representatives.
- C. *Concealing Work.* Prior to concealing work, Subdivider shall obtain approval of work from the following three entities: 1) Engineering & Capital Projects Department; 2) Development Services Department; and 3) Special Inspections as required by all State Building Codes and as stipulated in this Agreement. This approval is general approval only and in no way relieves Subdivider of its sole responsibilities under this Agreement or any and all laws, codes, permits or regulations. Subdivider shall fulfill all requirements of each of these three agencies.
7. **Property Rights.** Subdivider shall provide all required easement documents, including but not limited to: dedication, acquisitions, set asides, street vacations, abandonments, subordination agreements, and joint use agreements, as required by City of San Diego Real Estate Assets Department requirements and Council Policy 600-04, "STANDARDS FOR RIGHTS OF WAY AND IMPROVEMENTS INSTALLED THEREIN". City shall not require Subdivider to provide any easement documents for land to which Subdivider does not have title; however, Subdivider shall not relinquish, sell or transfer title to avoid any obligation under this Section, this Agreement, the Public Facilities Financing Plans or any applicable Development Agreement.
8. **Permits.** The Parties acknowledge the construction work to be performed on the Project by Subdivider in compliance with this Agreement is subject to the prior issuance of building, land development, and/or public improvement permits paid for and obtained by Subdivider. In the event that City, or any other governmental agency, unreasonably refuses to issue the permit(s) necessary to authorize the work to be performed or if the permit(s) are unreasonably canceled or suspended, then Subdivider is relieved from its obligation to construct those improvements covered by the denial of said permit(s), and City shall reimburse Subdivider in accordance with the terms of the Agreement for the work completed. All plans, specifications and improvements completed to the date of the denial, suspension or cancellation of said permit(s) shall become the property of City upon reimbursement as set forth above.
9. **Maintenance.** Subdivider shall maintain and be responsible for the Project site until Operational Acceptance of the Project, including ongoing erosion prevention measures. Unless stated otherwise in the Agreement, upon Acceptance of the Project, City shall be responsible for all maintenance of Project site.
10. **Drug-Free Workplace.** The Subdivider agrees to comply with the City's requirements in Council Policy 100-17, "DRUG-FREE WORKPLACE," adopted by San Diego Resolution R-277952 and incorporated into this Agreement by this reference. The Subdivider shall certify to the City that it will provide a drug-free workplace by submitting a Subdivider Certification for a Drug-Free Workplace form [Exhibit W].

- A. *Subdivider Notice to Employees.* The Subdivider shall publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the work place, and specifying the actions that will be taken against employees for violations of the prohibition.
- B. *Drug-Free Awareness Program.* The Subdivider shall establish a drug free awareness program to inform employees about all of the following:
- i. The dangers of drug abuse in the work place.
 - ii. The policy of maintaining a drug free work place.
 - iii. Available drug counseling, rehabilitation, and employee assistance programs.
 - iv. The penalties that may be imposed upon employees for drug abuse violations.
 - v. In addition to section 10(A) above, the Subdivider shall post the drug free policy in a prominent place.
- C. *Subdivider's Agreements.* The Subdivider further certifies that each contract for Consultant or Contractor Services for this Project shall contain language that binds the Consultant or Contractor to comply with the provisions of section 10 "Drug-Free Workplace, as required by Sections 2.A(1) through (3) of Council Policy 100-17. Consultants and Contractors shall be individually responsible for their own drug free work place program.

EXHIBIT Q

Product Submittal and Substitution

1. **Product Submittal.** Prior to the bidding process, Subdivider shall submit for City approval a list of products intended for use in the Project. Upon Subdivider's completion of plans and specifications, City will review and approve products specified therein. Subdivider shall provide City a copy of each submittal for City approval throughout the duration of construction within twenty (20) Calendar Days of Subdivider's receipt of submittal. Approval is general approval only and in no way relieves Subdivider of its sole responsibilities under this Agreement or any and all laws, codes, permits or regulations.
2. **Substitutions.** Subdivider shall submit all requests for product substitutions to City in writing within thirty (30) Calendar Days after the date of award of the construction contract. After expiration of the thirty (30) calendar days, City will allow substitution only when a product becomes unavailable due to no fault of Subdivider's contractor. City shall review substitution requests within thirty (30) Calendar Days of submission of such requests. Subdivider agrees that City requires Consultant's input and as such Subdivider shall coordinate a seven (7) calendar review by its Consultant.
 - A. *Substantiate Request.* Subdivider shall include with each substitution request complete data that substantiates that the proposed substitution conforms to requirements of the Contract Documents.
 - B. *Subdivider Representations.* By submitting a substitution request, Subdivider is representing to City all of the following: (a) Subdivider has investigated proposed product and determined that in all respect the proposed product meets or exceeds the specified product; (b) Subdivider is providing the same warranty for the proposed product as was available for the specified product; (c) Subdivider shall coordinate installation and make any other necessary modifications that may be required for work to be complete in all respects; and (d) Subdivider shall waive any claims for additional costs related to the substituted product, unless the specified product is not commercially available.
 - C. *Separate Written Request.* City will not consider either substitutions that are implied in the product data submittal without a separate written request or substitutions that will require substantial revision of construction contract documents.
3. **Samples.**
 - A. *Postage.* Samples shall be sent to Subdivider's office, carriage prepaid.
 - B. *Review.* Subdivider shall furnish to City for review, prior to purchasing, fabricating, applying or installing, two (2) samples (other than field samples) of each required material with the required finish.

- i. Where applicable, all samples shall be 8" x 10" in size and shall be limited in thickness to a minimum consistent with sample analysis. In lieu thereof, the actual full-size item shall be submitted.
- ii. Subdivider shall assign a submittal number. Subdivider shall include with each submission a list of all samples sent, a statement as to the usage of each sample and its location in the Project, the name of the manufacturer, trade name, style, model, and any other necessary identifying information.
- iii. All materials, finishes, and workmanship in the complete building shall be equal in every respect to that of the reviewed sample.
- iv. City will return one submitted sample upon completion of City review.
- v. Subdivider's, or Subdivider's agent's, field samples shall be prepared at the site. Affected finish work shall not commence until Subdivider or its agents have been given a written review of the field samples.

EXHIBIT R

Extra Work Provisions

1. **Extra Work.** City may at any time prior to Final Completion order Extra Work on the Project. The sum of all Extra Work ordered shall not exceed five percent (5%) of the Estimated Cost at the time of Bid Award, without invalidating this Agreement and without notice to any surety.
 - A. *Requests in Writing.* All requests for Extra Work shall be in writing, and shall be treated as and are subject to the same requirements as Change Orders. Subdivider shall not be responsible for failure to perform Extra Work, which was requested in a manner inconsistent with this Section.
2. **Bonds Required for Extra Work.** Subdivider's and its agents' bonds, under Article XIX, shall cover any Extra Work provided that the Extra Work is paid for by the Project as Reimbursable Costs and satisfies the other criteria specified herein.
3. **Reimbursement for Extra Work.** Work performed by Subdivider as Extra Work is reimbursable in the same manner described as in Article XIII. The Project Contingency as described in Article III, Section 3.3.2, will be used first to cover the costs of Extra Work.
4. **Markup.** Subdivider will be paid a reasonable allowance for overhead and profit. The allowance shall not exceed five percent (5%) and shall be added to the Subdivider's costs for Extra Work.
5. **Impact on Project Schedule.** Subdivider shall not have an obligation to perform Extra Work that will result in a delay unless the City approves an extension of time as provided for in the Agreement.

EXHIBIT S

Notification of Reimbursable Project

Pursuant to Section 13.1.1 of the "Reimbursement Agreement" [Agreement], adopted pursuant to Resolution No. 2-307252 and executed on _____, 20__, [Insert Subdivider Name] [Subdivider] hereby notifies the City of San Diego that work will begin on the following Project, [Insert Name of Project], also known as Project [Insert Project No. from Financing Plan] in the [Insert Financing Plan Name] Financing Plan on or about [Insert Date Work is Scheduled to Begin].

[Insert Name of Subdivider],
a California limited liability company

By: _____

[Title] _____

Dated: _____

EXHIBIT T

Inspection Schedule

Resident Engineer and Subdivider shall meet and confer prior to and during construction of the Project to establish an inspection schedule for the Project.

EXHIBIT U

Project Deliverables

Master Contract Documents.

- A. *Working Drawings.* Subdivider shall prepare Working Drawings in accordance with City's most current drawing format as outlined in City of San Diego's Manual of Preparation of Land Development and Public Improvement Plans.
 - i. *Quality.* Subdivider shall make Working Drawings by one of the following methods: permanent ink, Computer Aided Drafting, a permanent photographic reproduction process, or with pencil made for use on drafting film and permanently fixed with spray coating. Scale and clarity of detail shall be suitable for half size reduction.
 - ii. *Font and Contents.* At Subdivider's election, Specifications shall be referenced and/or described on the Plans and/or typewritten with one type face, using carbon ribbon or equivalent on bond paper utilizing Greenbook format. Subdivider will furnish only the technical "Special Provisions" section of the Specifications to supplement or modify the Greenbook standards as needed.
- B. *Surveys.* Subdivider shall provide all surveying services required for the design of this Project in accordance with all applicable legal regulations, the Technical Guidelines produced by the California Council of Civil Engineers & Land Surveyors under the title "A Guide to Professional Surveying Procedures," and the City of San Diego Engineering and Capitol Projects Department's "Data Standards for Improvement Plans," August 2004.
- C. *Schematic Design Documents.* Subdivider shall consult with City to ascertain requirements of the Project and to prepare Schematic Design Documents.
 - i. To the extent applicable as determined by the City, Schematic Design Documents shall include, but not be limited to the following:
 - a. Sketches with sufficient detail to illustrate the scale and location of Project components.
 - b. Floor plans with sufficient cross-sections to illustrate the scale and relationship of building components, exterior elevations and exterior colors and textures.
 - c. Analysis of parameters affecting design and construction for each alternate considered.

- d. Description and recommendation for structural, mechanical and electrical systems, showing alternatives considered.
 - e. Probable construction costs for the base Project and all additive alternates considered.
 - f. Summary of Project requirements and a recommendation.
 - g. Artistic renderings of the Project
 - ii. Form. Subdivider's Schematics shall conform to the quality levels and standards in size, equipment, and all facets of its design and deliverables as set forth in City specifications and as may be updated prior to commencement of construction.
- D. *Design Development Documents.* Subdivider shall prepare from the approved Schematic Design Documents, for approval by City, Design Development Documents to fix and describe the size and character of the entire Project. To the extent applicable, these documents shall contain, at a minimum, the following:
- i. Site plan, indicating the nature and relational location, via dimensions, of all proposed Project components.
 - ii. Traffic circulation and landscaping should also be indicated at this stage if applicable.
 - iii. Plans, elevations, cross sections, and notes as required to fix and describe the Project components.
 - iv. Proposed construction schedules.
 - v. Technical 'Special Provisions' section of the Specifications.
 - vi. Outline of Specifications prepared in accordance with the latest recommended format of the Construction Specification Institute.
 - vii. Probable Project construction costs, for each component of the Project being considered in this phase.
- E. *Construction Documents.* Subdivider shall provide, based on the approved Design Development documents, Working Drawings and Specifications [throughout the Agreement and attached exhibits referred to as Construction Documents] setting forth in detail the requirements for construction of the Project, including the necessary bidding information.
- F. *Utility Location Requests.* Along with initial submission of Construction Documents, Subdivider shall furnish copies of the Service and Meter Location Request and all utility companies verifications.

- G. *Cost Estimate.* Subdivider shall provide a construction cost estimate based on the Construction Documents.
- H. *H, G, & E Reports.* Subdivider shall provide hydrologic, geotechnical, environmental documents, and other related documents or reports as required by City.
- I. *As-Builts.* Subdivider shall provide As-Builts that meet current City requirements.
- i. City, including but not limited to, Engineering and Capital Projects Department, will evaluate the submitted As-Builts for accuracy and completeness and may return comments. Subdivider shall meet with City until all issues are resolved. Upon issue resolution, Subdivider shall submit a mylar set, a digital copy (PDF), and three (3) final blueline sets of As-Builts stamped by the architect/engineer of record as required by law.
 - ii. To the extent applicable as determined by the City, Subdivider shall include all of the following on the As-Builts:
 - a. Depth of foundation in relation to finished first floor.
 - b. Horizontal and vertical locations of underground utilities and appurtenances, with references to permanent surface improvements.
 - c. Locations of internal utilities and appurtenances, with references to visible and accessible features of the structure.
 - d. Field changes of dimensions and details.
 - e. Changes authorized by approved proposal requests, construction change orders, discussion with City that resulted in any change/deviation from City's program, specifications, approved plans, equipment or materials.
 - f. Details not issued with original contract drawings, design/build plans, deferred approvals, etc.
 - g. Upon completion of work, obtain signature of licensed surveyor or civil engineer on the Project record set verifying layout information pursuant to Business & Professions Code Section 6735.6.
 - h. Show locations of all utilities on site with size, and type of pipe, if different than specified, and invert elevations of pipe at major grade and alignment changes.
 - i. The title "PROJECT RECORD" in 3/8" letters.

- iii. Subdivider shall maintain a set of As-Builts at the Project site for reference. Subdivider shall ensure that changes to the As-Builts are made within twenty-four hours after obtaining information. Changes shall be made with erasable colored pencil (not ink or indelible pencil), shall clearly describe the change by note (note in ink, colored pencil or rubber stamp) and by graphic line, shall indicate the date of entry, shall circle the area or areas affected and, in the event of overlapping changes, use different colors for each change.

J. *Operation and Maintenance Manuals.* Subdivider shall submit all Operation and Maintenance manuals prepared in the following manner:

- i. In triplicate, bound in 8½ x 11 inch (216 x 279 mm) three-ring size binders with durable plastic covers prior to City's Final Inspection.
- ii. A separate volume for each system, including but not limited to mechanical, electrical, plumbing, roofing, irrigation, and any other system as determined by City, with a table of contents and index tabs in each volume as follows:
 - a. Part 1: Directory, listing names, addresses, and telephone numbers of Subdivider's agents, suppliers, manufacturers, and installers.
 - b. Part 2: Operation and Maintenance Instructions, arranged by specification division or system. For each specification division or system, provide names, addresses and telephone numbers of Subdivider's agents, suppliers, manufacturers, and installers. In addition, list the following: 1.) appropriate design criteria; 2) list of equipment; 3) parts list; 4) operating instructions; 5) maintenance instructions, equipment; 6) maintenance instructions, finishes; 7) shop drawings and product data; and 8) warranties.

EXHIBIT V

Typical Insurance Provisions

1. Types of Insurance. At all times during the term of this Agreement, Subdivider shall maintain insurance coverage as follows:
 - 3.1 *Commercial General Liability.* Subdivider shall provide at its expense a policy or policies of Commercial General Liability [CGL] Insurance written on an ISO Occurrence form CG 00 01 07 98 or an equivalent form providing coverage at least as broad and which shall cover liability arising from premises and operations, XCU (explosions, underground, and collapse) independent contractors, products/completed operations, personal injury and advertising injury, bodily injury, property damage, and liability assumed under an insured's contract (including the tort liability of another assumed in a business contract). There shall be no endorsement or modification of the CGL Insurance limiting the scope of coverage for either "insured vs. insured" claims or contractual liability. Subdivider shall maintain the same or equivalent CGL Insurance as described herein for at least ten (10) years following substantial completion of the work. All costs of defense shall be outside the policy limits. The Policy shall provide for coverage in amounts not less than the following: (i) General Annual Aggregate Limit (other than Products/Completed Operations) of two million dollars (\$2,000,000); (ii) Products/Completed Operations Aggregate Limit of two million dollars (\$2,000,000); (iii) Personal Injury Limit one million dollars (\$1,000,000); and (iv) Each Occurrence one million dollars (\$1,000,000).
 - 3.2 *Commercial Automobile Liability.* For all of Subdivider's automobiles used in conjunction with the Project including owned, hired and non-owned automobiles, Subdivider shall keep in full force and effect, a policy or policies of Commercial Automobile Liability Insurance written on an ISO form CA 00 01 12 90 or a later version of this form or equivalent form providing coverage at least as broad in the amount of one million dollars (\$1,000,000) combined single limit per occurrence, covering bodily injury and property damage for owned, non-owned and hired automobiles ["Any Auto"]. All costs of defense shall be outside the policy.
 - 3.3 *Architects and Engineers Professional Liability.* For all of Subdivider's employees who are subject to this Agreement, Subdivider shall keep in full force and effect, or Subdivider shall require that its architect/engineer(s) of record keep in full force and effect errors and omissions insurance providing coverage for professional liability with a combined single limit of one million dollars (\$1,000,000) per claim and two million dollars (\$2,000,000) annual aggregate. Subdivider shall ensure both that (i) this policy retroactive date is on or before the date of commencement of the Project; and (ii) this policy has a reporting period of three (3) years after the date of completion or termination of this Contract.

Subdivider agrees that for the time period defined above, there will be no changes or endorsements to the policy that increases the City's exposure to loss.

- 3.4 *Worker's Compensation.* For all of Subdivider's employees who are subject to this Contract and to the extent required by the State of California, Subdivider shall keep in full force and effect, a Workers' Compensation Insurance and Employers' Liability Insurance to protect Subdivider against all claims under applicable state workers' compensation laws. The City, its elected officials, and employees will not be responsible for any claims in law or equity occasioned by the failure of the Subdivider to comply with the requirements of this section. That policy shall provide at least the Statutory minimums of one million dollars (\$1,000,000) for Bodily Injury by Accident for each accident, one million dollars (\$1,000,000) for Bodily Injury by Disease each employee, and a one million dollars (\$1,000,000) for Bodily Injury by Disease policy limit. Subdivider shall provide an endorsement that the insurer waives the right of subrogation against the City and its respective elected officials, officers, employees, agents and representatives.

- 3.4.1 Prior to the execution of the Agreement by the City, the Subdivider shall file the following signed certification:

"I am aware of the provisions of Section 3700 of the Labor Code which requires every employer to be insured against liability for worker's compensation or to undertake self-insurance, in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of the Contract."

- 3.5 *Builder's Risk.* To the extent commercially available, Subdivider shall provide a policy of "all risk" Builders Risk Insurance. Subdivider shall add City and its respective elected officials, officers, employees, agents, and representatives to the policy as additional named insureds or loss payees, to the extent such insurance is commercially available. Subdivider shall also add its construction contractor, and the construction contractor's subcontractors to the policy as additional named insureds or loss payees, to the extent such insurance is commercially available. The insurance may provide for a deductible which shall not exceed fifty thousand dollars (\$50,000). It shall be Subdivider's responsibility to bear the expense of this deductible. The Builders Risk coverage shall expire at the time such insured property is occupied by City, or a Notice of Completion is filed, whichever occurs first.

4. Endorsements Required. Each policy required under Section 1, above, shall expressly provide, and an endorsement shall be submitted to the City, that:

- 4.1 *Additional Insureds.* Except as to Architects and/or Engineers professional liability insurance and Workers Compensation, the City of San Diego and its respective elected officials, officers, employees, agents, and representatives shall be named as additional insureds.

4.1.1 Commercial General Liability. The policy or policies must be endorsed to include as an Insured the City of San Diego and its respective elected officials, officers, employees, agents, and representatives. The coverage for Projects for which the Engineer's Estimate is one million dollars (\$1,000,000) or more shall include liability arising out of: (i) Ongoing operations performed by you or on your behalf, (ii) Your products, (iii) Your work, including but not limited to your completed operations performed by you or on your behalf, or (iv) premises owned, leased, controlled, or used by you; the coverage for Projects for which the Engineer's Estimate is less than one million dollars (\$1,000,000) shall include liability arising out of: (i) Ongoing operations performed by you or on your behalf, (ii) Your products, or (iii) premises owned, leased, controlled, or used by you; Except that in connection with, collateral to, or affecting any construction contract to which the provisions of subdivision (b) of Section 2782 of the California Civil Code apply, these endorsements shall not provide any duty of indemnity coverage for the active negligence of the City of San Diego and its respective elected officials, officers, employees, agents, and representatives in any case where an agreement to indemnify the City of San Diego and its respective elected officials, officers, employees, agents, and representatives would be invalid under subdivision (b) of Section 2782 of the California Civil Code. In any case where a claim or loss encompasses the negligence of the Insured and the active negligence of the City of San Diego and its respective elected officials, officers, employees, agents, and representatives that is not covered because of California Insurance Code section 11580.04, the insurer's obligation to the City of San Diego and its respective elected officials, officers, employees, agents, and representatives shall be limited to obligations permitted by California Insurance Code section 11580.04.

4.1.2 Commercial Automobile Liability Insurance. Unless the policy or policies of Commercial Auto Liability Insurance are written on an ISO form CA 00 01 12 90 or a later version of this form or equivalent form providing coverage at least as broad, the policy or policies must be endorsed to include as an Insured the City of San Diego and its respective elected officials, officers, employees, agents, and representatives, with respect to liability arising out of automobiles owned, leased, hired or borrowed by or on behalf of the Subdivider; except that in connection with, collateral to, or affecting any construction contract to which the provisions of subdivision (b) of Section 2782 of the California Civil Code apply, this endorsement shall not provide any duty of indemnity coverage for the active negligence of the City of San Diego and its respective elected officials, officers, employees, agents, and representatives in any case where an agreement to indemnify the City of San Diego and its respective elected officials, officers, employees, agents, and representatives would be invalid under subdivision (b) of Section 2782 of the California Civil Code. In any case where a claim or loss encompasses the negligence of the

Insured and the active negligence of the City of San Diego and its respective elected officials, officers, employees, agents, and representatives that is not covered because of California Insurance Code section 11580.04, the insurer's obligation to the City of San Diego and its respective elected officials, officers, employees, agents, and representatives shall be limited to obligations permitted by California Insurance Code section 11580.04.

- 4.2 *Primary and Non-Contributory.* The policies are primary and non-contributing to any insurance or self-insurance that may be carried by the City of San Diego, its elected officials, officers, employees, agents, and representatives with respect to operations, including the completed operations if appropriate, of the Named Insured. Any insurance maintained by the City of San Diego and its elected officials, officers, employees, agents, and representatives shall be in excess of Subdivider's insurance and shall not contribute to it.
- 4.3 *Project General Aggregate Limit.* The CGL policy or policies must be endorsed to provide a Designated Construction Project General Aggregate Limit that will apply only to the work performed under this Agreement. Claims payments not arising from the work shall not reduce the Designated Construction Project General Aggregate Limit. The Designated Construction Project General Aggregate Limit shall be in addition to the aggregate limit provided for the products-completed operations hazard.
- 4.4 *Written Notice.* Except as provided for under California law, the policies cannot be canceled, non-renewed or materially changed except after thirty (30) calendar days prior written notice by Subdivider to the City by certified mail, as reflected in an endorsement which shall be submitted to the City, except for non-payment of premium, in which case ten (10) calendar days notice shall be provided.
- 4.5 The words "will endeavor" and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents, or representatives" shall be deleted from all certificates.

EXHIBIT W


Certification for a Drug-Free Workplace

PROJECT TITLE: NO. T-4.3 CARMEL VALLEY ROAD WIDENING
NO. P-6 TORREY HIGHLANDS TRAIL SYSTEM

I hereby certify that I am familiar with the requirement of San Diego City Council Policy No. 100-17 regarding Drug-Free Workplace as outlined in the request for proposals, and that:

MICHAEL DAVIDSON FAIRBANKS, LLC
Name under which business is conducted

has in place a drug-free workplace program that complies with said policy. I further certify that each subcontract agreement for this Project contains language that indicates the Subconsultants/Subcontractors agreement to abide by the provisions of Sections 2.A(1) through (3) of the policy as outlined.

Signed 
Printed Name MICHAEL LAVOIE
Title MEMBER
Date 3-29-2012

RESOLUTION NUMBER R- 307252

DATE OF FINAL PASSAGE FEB 6 2012

RESOLUTION OF THE CITY COUNCIL TO ADOPT AN AMENDMENT TO THE TORREY HIGHLANDS PUBLIC FACILITIES FINANCING PLAN AND AUTHORIZE A REIMBURSEMENT AGREEMENT WITH MREC-DAVIDSON FAIRBANKS, LLC FOR A PORTION OF PROJECT NO. T-4.3, CARMEL VALLEY ROAD (WIDEN TO FOUR LANES: VIA ALBERTURA TO CAMINO DEL SUR), AND A PORTION OF PROJECT NO. P-6, TORREY HIGHLANDS TRAIL SYSTEM, IN THE TORREY HIGHLANDS FINANCING PLAN AREA.

WHEREAS, on September 24, 2002, the City of San Diego City Council (City Council) adopted Resolution No. R-297090 granting Vesting Tentative Map No. 99-0329 (VTM) to MREC-Davidson Fairbanks, LLC., (MREC-Davidson) subject to certain conditions necessary to serve that development; and

WHEREAS, MREC-Davidson plans to design and construct a portion of Project No. T-4.3 and a portion of Project No. P-6 in the Torrey Highlands Community Plan area in accordance with the Torrey Highlands Public Facilities Financing Plan; and

WHEREAS, the Torrey Highlands Public Facilities Financing Plan and Facilities Benefit Assessment (FBA) for Fiscal Year 2010 (Financing Plan), adopted by Resolution No. R-304935 on May 26, 2009 identifies Project No. T-4.3, Carmel Valley Road, and Project No. P-6, Torrey Highlands Trail System, as projects to be funded by the FBA; and

WHEREAS, an amendment to the Financing Plan, on file in the Office of the City Clerk as Document No. RR- 307252 (Amendment) is proposed to amend the description of Project No. T-4-3, as it is appropriate to relocate and upsize the existing Del Mar Heights Pipeline as part of Project No. T.4-3; NOW, THEREFORE,

BE IT RESOLVED, by the Council of the City of San Diego, that the Mayor be and hereby is authorized and empowered to execute, for and on behalf of City, the Reimbursement

Agreement with MREC-Davidson Fairbanks, LLC for a portion of Project No. T-4.3 (Carmel Valley Road (Widen to Four Lanes: Via Albertura to Camino del Sur)), and Portion of Project No. P-6 (Torrey Highlands Trail System), in the Torrey Highlands Community, on file in the Office of the City Clerk as Document No. RR- 307252 (Agreement), under the terms and conditions set forth in the Agreement.

BE IT FURTHER RESOLVED, that Council Policy 300-07, Consultant Services Selection, is waived with respect to consultants with whom Subdivider, or its predecessor in interest with respect to the real property addressed in the VTM, entered into contracts for the projects that are the subject of the Agreement at least one year prior to the effective date of the Agreement.

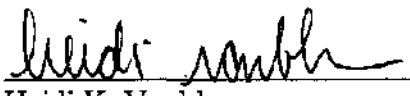
BE IT FURTHER RESOLVED, that the Chief Financial Officer is hereby authorized to expend an amount not to exceed Two Million Six Hundred Fifty-Six Thousand Six Hundred Thirty Dollars (\$2,656,630), in accordance with the terms of the Agreement, from the Torrey Highlands Fund No. 400094 in WBS S-00854 Carmel Valley Road (Widening to Four Lanes - Across the frontage of Fairbanks Country Villas), consistent with the timing established in the most recently adopted Financing Plan, and contingent upon Chief Financial Officer certification of funds available for reimbursement.

BE IT FURTHER RESOLVED, that the Chief Financial Officer is hereby authorized to expend an amount not to exceed Two Hundred Eighty-One Thousand Sixteen Dollars (\$281,016), in accordance with the terms of the Agreement, from the Torrey Highlands Fund No. 400094, in WBS RD-12002 (Torrey Highlands Trail Project), consistent with the timing established in the most recently adopted Financing Plan, and contingent upon Chief Financial Officer certification of funds available for reimbursement.

BE IT FURTHER RESOLVED, that the Chief Financial Officer, upon advice from the administering department, is hereby authorized to transfer excess funds, if any, to the appropriate reserves.

BE IT FURTHER RESOLVED, that the Amendment is adopted.

APPROVED: JAN I. GOLDSMITH, City Attorney

By 
Heidi K. Vonblum
Deputy City Attorney

HKV:hm

12/27/2011

Or.Dept:Facilities Financing

Doc. No.: 294220

I hereby certify that the foregoing Resolution was passed by the Council of the City of San Diego, at this meeting of ~~JAN 31 2012~~

ELIZABETH S. MALAND
City Clerk

By 
Deputy City Clerk

Approved: 2.6.12
(date)


JERRY SANDERS, Mayor

Vetoed: _____
(date)

JERRY SANDERS, Mayor

Passed by the Council of The City of San Diego on January 31, 2012 by the following vote:

YEAS: **LIGHTNER, FAULCONER, GLORIA, YOUNG, DEMAIO, ZAPP, EMERALD, ALVAREZ.**

NAYS: **NONE.**

NOT PRESENT: **NONE.**

VACANT: **NONE.**

RECUSED: **NONE.**

AUTHENTICATED BY:

JERRY SANDERS

Mayor of The City of San Diego, California

ELIZABETH S. MALAND

City Clerk of The City of San Diego, California

(SEAL)

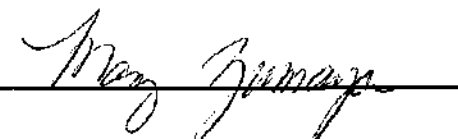
By: Mary Zumaya, Deputy

I HEREBY CERTIFY that the above and foregoing is a full, true and correct copy of
RESOLUTION NO. R-307252 approved by the Council of the City of San Diego, California,
and authenticated by the Mayor on February 6, 2012.

ELIZABETH S. MALAND

City Clerk of The City of San Diego, California

(SEAL)

By: , Deputy